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## TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920

No. 489

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CHARLES I. DAWSON, Attorney General of the State of  
Kentucky, VICTOR A. BRADLEY, Commonwealth's  
Attorney for the Fourteenth Judicial District  
of Kentucky, JOHN J. CRAIG, Auditor  
of Public Accounts of the State  
of Kentucky, *Appellants*,

*versus*

KENTUCKY DISTILLERIES & WAREHOUSE COMPANY  
*Appellee*.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE EASTERN DISTRICT OF KENTUCKY.

---

FILED, . 1920

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Kentucky, VICTOR A. BRADLEY, Commonwealth's  
Attorney for the Fourteenth Judicial District  
of Kentucky, JOHN J. CRAIG, Auditor  
of Public Accounts of the State  
of Kentucky, *Appellants*,

VERSUS

KENTUCKY DISTILLERIES & WAREHOUSE COMPANY,  
*Appellee*.

---

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE EASTERN DISTRICT OF KENTUCKY.

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## INDEX.

	Page
Bill in Equity.....	1
EXHIBIT: Act of March 12, 1920.....	14
Plaintiff's Motion for an Interlocutory Injunction.....	18
Defendant's Motion to Dismiss.....	20, 21
Defendant's Motion for Stay of Proceedings.....	22
EXHIBIT: Record in State Court Suit.....	24
Order . . . . .	50
Opinion: <i>Per Curiam</i> . . . . .	52
Opinion in Freiberg vs. Lou, Public Wh'se Co.....	53
Judgment Granting Temporary Injunction.....	84
Petition for Appeal.....	87
Assignment of Errors.....	88
Appeal Bond . . . . .	89
Order Granting Appeal.....	92
Stipulation and Waiver of Citation.....	93
Clerk's Certificate . . . . .	94





## **TRANSCRIPT OF RECORD.**

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PROCEEDINGS of the District Court of the United States for the Eastern District of Kentucky, at a regular term begun and held at the Federal Court Hall in the City of Frankfort, on Monday, September 22, 1919.

PRESENT: HON. A. C. DENISON, Circuit Judge.

HON. WALTER EVANS,

HON. A. M. J. COCHRAN, District Judges.

BE IT REMEMBERED that heretofore, to-wit: on May 14, 1920, came the plaintiff herein by Wm. Marshall Bullitt, Esq., its Counsel, and filed in the Clerk's office in our said Court, its Bill in Equity, which is in words and figures as follows, to-wit:

### **IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.**

**No. 937.**

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KENTUCKY DISTILLERIES AND WAREHOUSE

COMPANY, - - - - - *Plaintiff,*

*vs.*

CHARLES I. DAWSON, Attorney General of the State of Kentucky,

VICTOR A. BRADLEY, Commonwealth's Attorney for the 14th Judicial District of Kentucky, and

JOHN J. CRAIG, Auditor of Public Accounts of the State of Kentucky, - *Defendants.*

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### **BILL IN EQUITY.**

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*To the Honorable, the Judges of the District Court of the United States for the Eastern District of Kentucky at Frankfort:*

The plaintiff, Kentucky Distilleries and Warehouse Company, states as follows, to-wit:

1. The KENTUCKY DISTILLERIES AND WAREHOUSE COMPANY (hereinafter called the KENTUCKY COMPANY) is a corporation created and organized on, and existing since, February 3, 1899, under the laws of the State of New Jersey, with power to engage in, and, since February 3, 1899, it has (in Kentucky, Illinois, Rhode Island, Connecticut, New Jersey, and in the several other States of the United States) been engaged in, the business of (a) distilling, manufacturing, storing, distributing, buying and selling and transporting to and from Kentucky, from and to, the other States both under bond and otherwise, whiskey, alcohol, high wines, and other distilled spirits for beverage purposes up to January 16, 1920, and for non-beverage purposes up to the present time, and (b) owning, operating and maintaining a large number of registered distilleries, bonded warehouses, bottling plants, distributing agencies, and other properties necessary for the conduct of its business throughout the United States, and it is a citizen of the State of New Jersey.

CHARLES I. DAWSON, a defendant to this Bill, is the Attorney-General of the State of Kentucky, is a citizen of the State of Kentucky, and is an inhabitant of the Eastern District thereof at Frankfort.

VICTOR A. BRADLEY, a defendant to this Bill, is the Commonwealth's Attorney for the Fourteenth Judicial District of Kentucky, is a citizen of the State of Kentucky and is an inhabitant of the Eastern District thereof at Georgetown.

JOHN J. CRAIG, a defendant to this Bill, is the Auditor of Public Accounts for the State of Ken-

tucky, is a citizen of the State of Kentucky, and is an inhabitant of the Eastern District thereof at Frankfort.

These three defendants are by law charged with the duty of enforcing, and they threaten to, enforce the terms and provisions of the hereinafter mentioned Act of March 12, 1920, within the State of Kentucky, wherein the plaintiff does and carries on a large part of its business.

2. This is a suit of a civil nature, in equity, between citizens of different States; the matter in controversy exceeds in value the sum of Three Thousand (\$3,000.00) Dollars exclusive of interest and costs; it is between citizens of different States; it arises under the Constitution and laws of the United States, and particularly under (1) Article I, Section 8, Clause 3 of the Constitution wherein Congress is given power to regulate commerce with foreign nations and among the several States, and (2) the Fourteenth and Eighteenth Amendments to the Constitution, the Internal Revenue Laws of the United States, and Title II of an Act of Congress passed October 28, 1919, entitled "*An Act to prohibit intoxicating beverages, and to regulate the manufacture, production, use and sale of high-proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye, and other lawful industries*" (hereinafter called the National Prohibition Act); and this is a suit to restrain the defendants from enforcing against the plaintiff the

pains and penalties provided for in Section 5 of an Act of the General Assembly of the State of Kentucky, approved March 12, 1920, entitled "*An Act imposing an annual license tax upon every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits known as whiskey or brandy or other species of double stamp spirits in this state, and upon every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in the state, and in removing same therefrom for the purpose of sale, or for any other purpose; providing for monthly reports by distilleries and bonded warehousemen, for the purpose of ascertaining the amount of tax due; providing for monthly payments of the amount of license tax due; fixing a penalty for failure to make such monthly report and settlement; providing for the manner of distribution of the taxes so collected; repealing all other license, franchise and excise taxes on the businesses covered by this act, and declaring an emergency to exist*" (hereinafter called the "50 Cent a gallon Tax Act").

3. The KENTUCKY COMPANY is now, and for more than five years last past has been the owner, either in its own name or in that of Julius Kessler & Company (which is a subsidiary branch of and is entirely owned by the KENTUCKY COMPANY), of more than,

(a) 5,000 barrels of whiskey, containing according to the original official gauge about 250,-

000 proof gallons; of that 5,000 barrels about 2,500 barrels contain about 125,000 proof gallons according to the original official gauge, and were manufactured by the plaintiff more than to-wit: five years ago, and were then, and always have been and are now, owned, and were originally entered into by and are now, in U. S. bonded warehouses in the name of the plaintiff; the remaining 2,500 barrels of whiskey contain about 125,000 proof gallons, according to the original official gauge, and were manufactured by plaintiff's said branch more than to-wit: five years ago, and were then, and always have been and are now, owned and were originally entered into by and now are in U. S. bonded warehouses in the name of said Julius Kessler & Company; the actual cost and value to the plaintiff of said first above named 2,500 barrels of whiskey was at the time of its said manufacture more than to-wit: five years ago, and continuously since said date has been, in excess of to-wit: \$100,000, and the actual cost and value of said second mentioned 2,500 barrels of whiskey was, at the time of its said manufacture more than to-wit: five years ago, and since has been, in excess of to-wit \$100,000; the actual value of all said whiskey is now in excess of \$200,000; the said 5,000 barrels of whiskey were originally and now are stored in said bonded warehouses, in the States of Kentucky, Illinois, Missouri and New Jersey, but by far the greater portion is in Kentucky.

(b) About 32,000 cases of whiskey in bottled-in-bond form, each case containing 3 gallons, of which about 2000 cases, of the value of over \$40,000 are owned by the Kentucky Company, and about 30,000 cases of the value of over \$600,000 are owned by the Kentucky Company in the name of said Julius Kessler & Company; and all are and since their manufacture over, to-wit, five years ago, have been in various U. S. bonded warehouses in Kentucky.

4 There are now in the United States bonded warehouses that are owned by the KENTUCKY COMPANY about 167,000 barrels of whiskey all manufactured by the KENTUCKY COMPANY over to-wit: five years ago, of which there are:

(a) In its bonded warehouses located in Kentucky about 160,000 barrels of whiskey, containing, to-wit: 8,000,000 proof gallons, according to the original official gauge, and

(b) In its bonded warehouses located in Peoria, Illinois, about 4,000 barrels of whiskey, containing, to-wit: 200,000 proof gallons, according to the original official gauge.

The actual cost and value of said whiskey, described in paragraphs (a) and (b) above, was and is far in excess of \$5,000,000; all of said whiskey belongs to thousands of individuals, firms, banks and corporations, all or nearly all of whom are residents and citizens of the United States; the owners thereof purchased the same in various quantities at different times principally during each of the five years prior to December 18, 1917 and they hold the KENTUCKY COMPANY'S warehouse receipts which were duly issued by it at said times in the regular course of its business, and by and with the consent and approval of the Internal Revenue Department and officials of the United States and duly and legally represent said whiskey; the said warehouse receipts are negotiable instruments, are and always have been dealt in and handled as such and pass by endorsement and delivery and the names of said thousands of owners and holders thereof are unknown to and

can not be ascertained by the KENTUCKY COMPANY.

The owners of such warehouse receipts are looking to the KENTUCKY COMPANY as warehouseman, and are insisting that it shall perform the duties of a warehouseman with reference thereto.

From day to day the holders of such receipts are demanding that the KENTUCKY COMPANY ship, under bond, large quantities of whiskey from Kentucky to other States, and it is so shipping such whiskey.

5. The KENTUCKY COMPANY is, and for twenty years last past has been, the owner of said warehouses, in which the aforesaid whiskey is stored, but the warehouses are by law bonded to the United States, and such of said warehouses as are in Kentucky are in the possession of and under the direction and control of the Collector of Internal Revenue in said State.

The KENTUCKY COMPANY has employed, and still employs, a large number of officers, salesmen and agents, and has been doing an annual business of many thousands of dollars.

In the course of its business its whiskey must be transported under bond pursuant to the laws of the United States providing for such transportation from one place to another within the same State and from one State to another State in quantities of one barrel or more of bulk goods, or of one case or more of case goods, and this requires many separate transactions.

6. On March 12, 1920, there was enacted by the General Assembly of the Commonwealth of Ken-



tucky, and approved by the Governor of Kentucky, the said "50 Cent a gallon Tax Act" which, among other things, provides in substance as follows, to-wit:

1. That every corporation engaged, as is the KENTUCKY COMPANY, in owning and storing whiskey in bonded warehouses and in removing such whiskey therefrom,

"shall pay an annual license tax to the Commonwealth of Kentucky of 50c on every proof gallon of said distilled spirits so manufactured or stored in a bonded warehouse, or withdrawn from a bonded warehouse, or transferred therefrom under bond out of the Commonwealth of Kentucky."

2. That every corporation owning or operating a bonded warehouse in Kentucky where whiskey is stored, as does the KENTUCKY Co., shall (1) on or before June 1st, 1920, file a report with the defendant Craig, as Auditor of Public Accounts, showing the number of proof gallons of whiskey withdrawn from bond since March 12, 1920, and (2) monthly thereafter file a similar report showing the number of such gallons so withdrawn since the date of making the last preceding report, and also the number of proof gallons transported under bond out of the State of Kentucky.

3. That every corporation owning or controlling a bonded warehouse, as the KENTUCKY Co. does, shall at the time of making the reports above mentioned, pay to the defendant, Craig, as Auditor of Public Accounts, a

"tax of 50c per proof gallon upon each proof gallon of such spirits removed from the bonded warehouse owned, controlled or operated by such person, corporation, association or partnership, or transferred under bond out of this State, up to the date of making such report";

and that to secure the payment of such tax the Commonwealth of Kentucky shall have a lien on all whis-

key stored in the warehouse together with the other property of the warehouseman used in connection therewith.

4. That every corporation failing to make the reports above mentioned and failing to pay the taxes therein provided for

“shall be guilty of a misdemeanor and, upon conviction, shall be fined not less than \$500, nor more than \$1000, and each day after the date such report is due that such person, corporation, association or partnership is in default, shall be treated and considered as a separate offense.”

A copy of such act is filed herewith as part hereof, marked “Exhibit 1.”

7. Since March 12, 1920, the KENTUCKY COMPANY has taxpaid and withdrawn from bond, 86986 proof gallons of whiskey, and has transported under bond from its bonded warehouses in Kentucky, to other bonded warehouses outside of Kentucky, 7870 proof gallons of whiskey.

8. The defendants, John J. Craig, Auditor of Public Accounts, and Charles I. Dawson, Attorney General of the State of Kentucky, and Victor A. Bradley, Commonwealth's Attorney for the Fourteenth Judicial District of Kentucky are, by law charged with the duty of enforcing, and are preparing to enforce actively on June 1, 1920, all of the provisions of said “50c a gallon Tax Act.”

They insist that the KENTUCKY Co. shall file the reports therein called for, and shall pay the 50c a gallon tax above mentioned; and they, and each of them, are threatening to bring numerous criminal

prosecutions against all persons, including the KENTUCKY COMPANY, its officers, agents and employes, who shall fail to make the reports and to pay the taxes provided for in said Act; and, unless restrained, they will, by indictment or penal actions, seek to have imposed upon the KENTUCKY Co., its officers, agents and employes, a fine of not less than \$500, nor more than \$1000 for each day in which the KENTUCKY COMPANY is in default in not filing such reports or paying said taxes.

9. The "50c a gallon Tax Act" provides that in order to secure the payment of the tax above mentioned, the Commonwealth of Kentucky shall have a lien on (a) all the spirits stored in such bonded warehouses, and (b) the other property of the bonded warehouseman used in connection therewith.

The defendants will, in the event that the KENTUCKY COMPANY shall not file the report and pay the tax provided for in said Act, assert a lien against all of the thousands of barrels of other whiskey stored in the KENTUCKY COMPANY'S various bonded warehouses in Kentucky and upon the real estate and the improvements thereon owned by the KENTUCKY Co. and constituting its warehouses. Such an action will create a cloud upon the title of the KENTUCKY COMPANY'S property.

10. The "50c a gallon Tax Act" is unconstitutional and void for the following reasons:

(a) So much thereof as imposes a tax of 50 cents upon each proof gallon of whiskey transported in

bond out of Kentucky into another State is a tax or burden upon Interstate Commerce in violation of Article 1, Section 8, Clause 3 of the Constitution of the United States which gives Congress the power to regulate commerce with foreign nations and among the several States and with the Indian tribes.

(b) By reason of the invalidity of so much of said Act as imposes a tax upon whiskey transported out of Kentucky into other States, the entire Act is invalid.

(c) The "50c a gallon Tax Act" is in violation of Section 171 of the Constitution of the State of Kentucky in that the tax is not uniform but imposes double taxation upon whiskey, a burden that is not imposed upon any other property in the State of Kentucky.

(d) The Act is not authorized by, but is in violation of Sections 171 and 181 A of the Constitution of the State of Kentucky in that the General Assembly was not authorized to provide for a license fee or tax on whiskey withdrawn from bond or transported out of Kentucky.

(e) The National Prohibition Act passed October 28, 1919, pursuant to the Eighteenth Amendment of the Constitution of the United States provides in Title II thereof the terms and conditions on which whiskey may be withdrawn from bonded warehouses or transported in bond from one State to another; and the said "50c a gallon Tax Act" is in conflict with the said Act of Congress.

WHEREFORE the plaintiff, KENTUCKY DISTILLERIES & WAREHOUSE COMPANY prays as follows, to-wit:

1. That the said "50c a gallon Tax Act" and especially so much thereof as imposes a tax upon whiskey transported in bond from Kentucky to another State, be declared unconstitutional and void.
2. That the defendants and each of them be enjoined and restrained from in any manner enforcing or attempting to enforce against the Kentucky Distilleries & Warehouse Company, its officers, agents or employes, or any of them, the penalties prescribed in and by Section 5 of said "50c a gallon Tax Act," and from indicting, prosecuting or attempting to indict or prosecute the Kentucky Distilleries & Warehouse Company, its officers, agents or employes or any of them for or on account of any failure to file the reports or pay the taxes provided for in said Act; and from in any manner enforcing or attempting to enforce any lien upon the whiskey or the bonded warehouses of the Kentucky Distilleries & Warehouse Company for the purpose of enforcing collection of said tax.
3. That a temporary injunction or other appropriate relief as above prayed, be granted, temporarily restraining the defendants and each of them pending the final hearing of this cause, from in any manner enforcing or attempting to enforce against the plaintiff, its officers, agents, or employes, or any of them, the penalties prescribed by Section 5 of said "50c a gallon Tax Act."

4. For such other and further relief as may be meet and proper in the premises.

MAY IT PLEASE YOUR HONORS, to grant unto the plaintiff a writ of subpoena, to be directed to the said Charles I. Dawson, Attorney General of the State of Kentucky, Victor A. Bradley, Commonwealth's Attorney for the Fourteenth Judicial District of Kentucky, and John J. Craig, Auditor of Public Accounts for the State of Kentucky, the defendants hereinbefore named, commanding and requiring them and each of them to appear herein and to answer, but not under oath, answer under oath being hereby expressly waived, the several allegations in this bill contained.

LEVY MAYER,

BRUCE & BULLITT,

*Counsel for Plaintiff.*

J. P. HANLEY, being first duly sworn, deposes and says that he is the Assistant Secretary of the plaintiff, Kentucky Distilleries & Warehouse Company; that he is the chief officer or agent in this State; that he has read the foregoing Bill in Equity, and that the statements therein contained are true.

J. P. HANLEY.

Subscribed and sworn to before me this 13th day of May, 1920.

M. L. WIEST,

Notary Public, Jefferson Co., Ky.

My commission expires March 25, 1922.

**EXHIBIT**—Filed May 14, 1920, J. W. Menzies,  
U. S. Clerk.

"AN ACT imposing an annual license tax upon every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits known as whiskey or brandy or other species of double stamp spirits in this state, and upon every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in the state, and in removing same therefrom for the purpose of sale, or for any other purpose; providing for monthly reports by distilleries and bonded warehousemen, for the purpose of ascertaining the amount of tax due; providing for monthly payments of the amount of license tax due; fixing a penalty for failure to make such monthly report and settlement; providing for the manner of distribution of the taxes so collected; repealing all other license, franchise and excise taxes on the businesses covered by this act, and declaring an emergency to exist."

*Be it enacted by the General Assembly of the Commonwealth of Kentucky:*

§1. Every **corporation**, association, partnership and individual engaged in the business of manufacturing distilled spirits, known as whiskey or brandy or other species of double stamp spirits, in this state; and every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in this state, and in removing same therefrom for the purpose of sale, or for any other purpose, shall pay an annual license tax to the Commonwealth of Kentucky of fifty cents on every proof gallon of said distilled spirits **so manufactured or stored in a bonded warehouse, or withdrawn from a bonded warehouse, or transferred therefrom under bond out of the Commonwealth of Kentucky.**

§2. Every corporation, association, partnership and individual owning, controlling or operating a bonded warehouse in this state, wherein distilled spirits known as whiskey or brandy or other species of double stamp spirits are stored, shall, on or before the 1st day of June, 1920, on blanks furnished by the Auditor of Public Accounts, report to the Auditor of Public Accounts the total



amount of such spirits stored in a bonded warehouse owned, controlled or operated by such corporation, association, partnership or individual; and shall make monthly reports to the Auditor of Public Accounts thereafter, which reports must be signed and sworn to by such person, or, in case of a corporation, association or partnership, by some officer or person authorized to make such oath. The first report provided for herein shall show the number of proof gallons of such spirits withdrawn from said warehouse from the date this act becomes effective to the date of making such report; and each monthly report thereafter shall show the number of proof gallons placed in said bonded warehouse since the date of making the last preceding report, the number of proof gallons withdrawn or transferred since the date of making the last preceding monthly report, and the aggregate number of gallons on hand at the date such report is made. In all cases where such spirits are transferred under bond from one bonded warehouse in this Commonwealth to another, said report shall show the warehouse from which same has been transferred and the warehouse to which same has been transferred, the quantity thereof and the serial number of each of the packages so transferred.

§3. Every person, corporation, association or partnership operating, owning or controlling such bonded warehouses shall, at the time said reports herein provided for are made, pay to the Auditor of Public Accounts the tax of fifty cents per proof gallon upon each proof gallon of such spirits **removed** from the bonded warehouse owned, controlled or operated by such person, corporation, association or partnership, **or transferred under bond out of this state**, up to the date of making such report; and for the purpose of securing the payment of the license taxes herein provided for, the Commonwealth shall have a lien on all such spirits stored in such bonded warehouses, together with the other property of the bonded warehouseman used in connection therewith; and in all cases where the spirits so removed or transferred were owned or controlled by another than the bonded warehouseman, then the bonded warehouseman shall collect and pay the tax due on such spirits so removed or



transferred under bond, and shall be subrogated to the lien of the Commonwealth.

§4. Every corporation, association, partnership and individual engaged in distilling spirits, known as whiskey or brandy or other species of double stamp spirits in this state, shall pay the license tax herein provided upon all such spirits so manufactured and removed from the premises without being placed in a bonded warehouse at the date of the removal of such spirits; and all such corporations, associations, partnerships and individuals engaged in the business of distilling such spirits in this state shall file monthly statements with the Auditor of Public Accounts, on blanks to be furnished by the Auditor, which statements must be sworn to and which statements shall show the number of proof gallons of such spirits so distilled and removed from the premises without having been stored in a bonded warehouse, and at the time of filing such statements shall pay to the Auditor of Public Accounts the amount due on such spirits so manufactured and removed; and for the payment of the taxes due under this provision, the Commonwealth shall have a lien upon all the machinery and the premises and the manufactured spirits made thereon, of the corporation, association, partnership or individual engaged in such distilling business.

§5. Every person, corporation, association or partnership failing to make the reports herein provided for, in the manner herein provided for, and failing to pay the taxes as they become due, as herein provided for, shall be guilty of a misdemeanor, and upon conviction, shall be fined not less than five hundred dollars nor more than one thousand dollars, and each day after the date such report is due that such person, corporation, association or partnership is in default shall be treated and considered as a separate offense.

§6. The tax herein provided for, when collected, shall be distributed as follows: To the state road fund, sixty-five per cent thereof; to the general expenditure fund, thirty-five per cent thereof.

§7. The license tax herein imposed shall be in lieu of all other license, franchise or excise taxes now imposed

by law on persons, corporations, partnerships or associations engaged in business covered by this act; and all acts in conflict therewith are hereby repealed, and especially there is hereby repealed chapter 5 of the Acts of the Special 1917 Session of the General Assembly of Kentucky.

§8. Whereas, many persons, corporations, associations and partnerships are now engaged in the business covered and licensed by this act, without paying an adequate license tax to the Commonwealth of Kentucky therefor; and whereas, the liquor which they are handling and in which they are dealing is constantly in large quantities being removed from the bonded warehouses and disposed of, without the state securing an adequate license tax thereon, an emergency is hereby declared to exist, and this act shall take effect from and after the date of its passage and approval by the Governor.

IN THE DISTRICT COURT OF THE UNITED  
STATES FOR THE EASTERN DISTRICT  
OF KENTUCKY.

No. 937.

KENTUCKY DISTILLERIES AND WAREHOUSE  
COMPANY, - - - - - Plaintiff,  
vs.

CHARLES L. DAWSON, Attorney General of  
the State of Kentucky,

VICTOR A. BRADLEY, Commonwealth's At-  
torney for the 14th Judicial District  
of Kentucky, and

JOHN J. CRAIG, Auditor of Public Ac-  
counts of the State of Kentucky, - Defendants.

**MOTION FOR AN INTERLOCUTORY INJUNCTION.**

The plaintiff, Kentucky Distilleries & Warehouse Company moves the Court to grant a writ of injunction against the defendants, Charles L. Dawson, Attorney General of the State of Kentucky, Victor A. Bradley, Commonwealth's Attorney for the Fourteenth Judicial District of Kentucky, and John J. Craig, Auditor of Public Accounts of the State of Kentucky and each of them pending this suit and until further order of this Court conformable to the prayer of the Bill in Equity in the above styled case filed, and particularly enjoining and restraining them, and each of them, from in any manner enforcing or attempting to enforce against the Ken-

tucky Distilleries & Warehouse Company, its officers, agents or employes, or any of them, the penalties prescribed in and by Section 5 of an Act of the General Assembly of the State of Kentucky approved March 12, 1920, called herein the "50c a gallon Tax Act," and from indicting, prosecuting, or attempting to indict or prosecute the Kentucky Distilleries & Warehouse Company, its officers, agents or employes, or any of them, for or on account of any failure by it or by them, to file the reports, or to pay the taxes provided for in the said Act, and from in any manner enforcing or attempting to enforce any lien upon the whiskey or the bonded warehouses of the Kentucky Distilleries & Warehouse Company, for the purpose of enforcing the collection of said taxes provided for in said Act.

LEVY MAYER,

WM. MARSHALL BULLITT,

*Counsel for Plaintiff.*

IN THE DISTRICT COURT OF THE UNITED  
STATES EASTERN DISTRICT  
OF KENTUCKY.

---

KENTUCKY DISTILLERIES AND WAREHOUSE  
COMPANY, - - - - - *Plaintiff,*  
*vs.*

CHARLES I. DAWSON, Attorney General of  
the State of Kentucky,

VICTOR A. BRADLEY, Commonwealth's At-  
torney for the 14th Judicial District  
of the State of Kentucky, and

JOHN J. CRAIG, Auditor of Public Ac-  
counts of the State of Kentucky, - *Defendants.*

---

**MOTION.**

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The defendants herein move that the Court dis-  
miss the bill of plaintiff, for the reason that same  
does not state facts sufficient to support a cause of  
action against them, or any of them.

CHAS. I. DAWSON,  
*Attorney General.*

IN THE DISTRICT COURT OF THE UNITED  
STATES EASTERN DISTRICT  
OF KENTUCKY.

---

KENTUCKY DISTILLERIES AND WAREHOUSE  
COMPANY, - - - - - *Plaintiff,*  
  
*vs.*

CHARLES I. DAWSON, Attorney General of  
the State of Kentucky,

VICTOR A. BRADLEY, Commonwealth's At-  
torney for the 14th Judicial District  
of the State of Kentucky, and

JOHN J. CRAIG, Auditor of Public Ac-  
counts of the State of Kentucky, - *Defendants.*

---

**MOTION.**

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The defendants herein move the Court to dismiss plaintiff's bill, because of lack of equity therein, and because the plaintiff has a full, complete and adequate remedy at law.

CHAS. I. DAWSON,  
*Attorney General.*

IN THE DISTRICT COURT OF THE UNITED  
STATES EASTERN DISTRICT OF  
KENTUCKY.

---

KENTUCKY DISTILLERIES AND WAREHOUSE  
COMPANY, - - - - - Plaintiff,  
*vs.*

CHARLES I. DAWSON, Attorney General of  
the State of Kentucky,

VICTOR A. BRADLEY, Commonwealth's At-  
torney for the 14th Judicial District  
of the State of Kentucky, and

JOHN J. CRAIG, Auditor of Public Ac-  
counts of the State of Kentucky, - Defendants.

---

**MOTION.**

---

Defendants, Charles I. Dawson, Attorney General of the State of Kentucky, Victor A. Bradley, Commonwealth's Attorney Fourteenth Judicial District of the State of Kentucky, and John J. Craig, Auditor of Public Accounts of the State of Kentucky, represent to the Court that there is now pending in the Franklin Circuit Court of Franklin County, Kentucky, a suit, wherein S. Rosenbloom & Company are the plaintiffs and E. H. Taylor, Jr., & Sons, John J. Craig, Auditor of the Commonwealth of Kentucky, and Charles I. Dawson, Attorney General of the Commonwealth of Kentucky, are parties defendant; that said suit involves the validity of the Act of the General Assembly of the Commonwealth

of Kentucky, approved March 12, 1920, referred to and embodied in the petition of the plaintiffs in this case. They represent to the Court that said Franklin Circuit Court is a Court of original and general jurisdiction, and has jurisdiction both of the subject matter involved in said suit and of the person of these defendants, and of their co-defendant, E. H. Taylor, Jr., & Sons, and the said Court has jurisdiction under the laws of the Commonwealth of Kentucky to enforce the act attacked in the said proceeding and attacked in the proceeding in this case.

They state that there has been issued and served upon them in the case pending in the Franklin Circuit Court, above referred to, a temporary restraining order issued by the Clerk of the Franklin Circuit Court, enjoining and restraining these defendants and each of them from enforcing said act or its penalties, by suit or indictment or otherwise, until further orders of the Court. They state that it is their purpose to press to a final conclusion the litigation now pending in the Franklin Circuit Court as speedily as can be done, and they say that by virtue of the said proceeding now pending in the Franklin Circuit Court, as above set out, under the provisions of Section 266 of the Judicial Code, proceedings in this Court should be stayed until the final determination of the said suit now pending in the Franklin Circuit Court.

They file in support of their motion a certified copy of the record of the suit now pending in the said Franklin Circuit Court.



WHEREFORE, they move the Court that it stay proceedings herein until the final determination of the suit now pending in the State Court aforesaid.

CHAS. I. DAWSON,  
*Attorney General.*

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**EXHIBIT IN CASE KY. DIST. & W. H. CO. vs. CHAS.**

**I. DAWSON, Atty. Gen. Ky., ET AL., No. 937**

—Filed June 4, 1920.

**Filed with Defendants' Motion for a Stay of Proceedings.**

FRANKLIN CIRCUIT COURT.

---

Sol Rosenbloom, trading as S. Rosenbloom &  
Company,      -      -      -      -      -      Plaintiffs,

vs.      PETITION IN EQUITY.

E. H. Taylor, Jr. & Sons (Inc.),      -      -      -      Defendant.

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The plaintiff says that he is a wholesale liquor dealer located at Pittsburgh, Penna., and a resident there trading and doing business under the name of S. Rosenbloom & Co., and in 1917 became the owner of several hundred barrels of distilled spirits—whiskey—by purchase from the defendant, E. H. Taylor, Jr. & Sons, a corporation organized under the laws of the State of Kentucky, and engaged in the manufacture of distilled spirits, to-wit: whiskey, and having its Home Office at Frankfort, in Franklin County, Kentucky, with its distilling plant and warehouses situated in Woodford County, near Frankfort, Kentucky.

The plaintiff says that the warehouse certificates for said whiskey were delivered to him at the time of the

purchase, but that the whiskey itself remained in the afore-mentioned warehouses. He says that about December, 1919, desiring to have certain of their said whiskey bottled in bond for export, to-wit: some two thousand (2,000) cases, they delivered to the defendant, warehouse receipts to cover that quantity of the barrel goods aforesaid, and after complying with all the regulations of the United States Revenue Laws affecting the removal and transfer of said goods in bulk under bond to another warehouse on the distillery premises, for bottling purposes, he caused the defendant to make such removal and upon such removal and transfer, to report to the Auditor of Public Accounts and pay into the Treasury of the Commonwealth of Kentucky, through said Auditor, the license tax of Two (2c) Cents on every proof gallon of said distilled spirits as was liable for taxation by the Federal Government, the quantity thereof being fixed and measured by the State Tax Commission. That said report and payment are shown in the report made in January, 1920.

The plaintiff says that while said whiskey was bottled in bond at a time when it could have been exported for beverage purposes, transportation could not be obtained in time for the shipment prior to January 16th, 1920, but said whiskey is yet entitled to be exported or used domestically for medicinal purposes.

That they have complied with all the government regulations concerning their right to sell and dispose of said whiskey, and with the necessary permits to do so, they have sold same for medicinal purposes and are entitled to its immediate possession for the purpose of shipment to the purchaser.

The plaintiffs say that for the purpose of having said bottled in bond goods shipped to the purchaser, they did on March 22nd, 1920, demand of the defendant the immediate possession of said two thousand (2,200) cases of whiskey and made preparations to load same on the cars at Taylorton, the railway station at the plant of the defendant, and had workmen at hand ready to engage in the work of loading same into cars procured for said purpose. That the defendant without right interfered with the work of its agents and servants in preparing to

ship said goods and did so on the sole ground that a license tax of Fifty (50c) Cents on the gallon had been imposed on the whiskey of the plaintiffs by an Act of the General Assembly entitled

“AN ACT imposing an annual license tax upon every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits known as whiskey or brandy or other species of double stamp spirits in this state, and upon every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in this state, and in removing same therefrom for the purpose of sale, or for any other purpose; providing for monthly reports by distilleries and bonded warehousemen, for the purposes of ascertaining the amount of tax due; providing for monthly payments of the amount of license tax due; fixing a penalty for failure to make such monthly report and settlement; providing for the manner of distribution of the taxes so collected; repealing all other license, franchise and excise taxes on the businesses covered by this Act; and declaring an emergency to exist.”

And which Act was approved on March 16th, 1920, and became effective on that date, and for which tax the defendant claims it would be liable in the event said whiskey was subject to said tax.

That the defendant has refused to permit the plaintiffs, or their agents and servants, to load said whiskey on the cars prepared for its shipment as aforesaid, unless and until the plaintiffs should pay said tax or agree to reimburse it for its payment of same. And so the defendant continues to interfere with and prevent their agents and servants from doing said work.

The plaintiffs further charge that the bottled in bond whiskey named, having been transferred and removed once from the warehouse and the license tax of Two (2c) Cents per gallon having been paid, it cannot be subjected to further or other license tax, nor, as they are advised, can it be subjected under the terms of the Act of March 16th, 1920, to the Fifty cent per gallon tax.

The plaintiffs say that the defendant is holding their whiskey without right and that they do not owe any further tax on the cases named.

They state that unless the defendant be enjoined and restrained from any further interfering with and preventing their agents and servants in the work of loading the plaintiff's whiskey on the cars, and preventing its delivery for shipment to the purchaser thereof, they will suffer great and irreparable injury, that no injunction herein has been applied for or refused by the Court or any Circuit Judge. He files herewith a copy of the Act of 1920, same not yet having appeared in printed form.

WHEREFORE, the plaintiffs pray that the defendant be enjoined from interfering with the plaintiffs, or his agents and servants in their work of taking possession of the two thousand (2,000) cases involved and loading same for shipment, and from further refusing the demand of the plaintiffs for the actual delivery of said whiskey to the plaintiffs, for a mandatory order to defendant to deliver said cases to the plaintiffs, and for all proper and appropriate relief.

Hazelrigg & Hazelrigg

Attys. for plaintiff.

IN HOUSE  
REGULAR SESSION, 1920

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HOUSE BILL No. 513  
THURSDAY, FEBRUARY 26, 1920.

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Mr. Vance introduced the following bill, which was ordered to be printed and referred to the Committee on Revenue and Taxation, viz:

AN ACT imposing an annual license tax upon every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits known as whiskey or brandy or other species of double stamp spirits in this state, and upon every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in this state, and in removing same therefrom for the purpose of sale, or for any other purpose; providing for monthly reports by distilleries and bonded warehousemen, for the purpose of ascertaining the amount of tax due; providing for monthly payments of the amount of license tax due; fixing a penalty for failure to make such monthly report and settlement; providing for the manner of distribution of the taxes so collected; repealing all other license, franchise and excise taxes on the businesses covered by this Act; and declaring an emergency to exist.

BE IT ENACTED BY THE GENERAL ASSEMBLY  
OF THE COMMONWEALTH OF KENTUCKY:

1. Every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits, known as whiskey or brandy or other species of double stamp spirits, in this state; and every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in this

state, and in removing same therefrom for the purpose of sale or for any other purpose, shall pay an annual license tax to the Commonwealth of Kentucky of fifty cents on every proof gallon of said distilled spirits so manufactured or stored in a bonded warehouse, or withdrawn from a bonded warehouse, or transferred therefrom under bond out of the Commonwealth of Kentucky.

2. Every corporation, association, partnership and individual owning, controlling or operating a bonded warehouse in this state, wherein distilled spirits known as whiskey or brandy or other species of double stamp spirits are stored, shall, on or before the first day of June, 1920, on blanks furnished by the Auditor of Public Accounts, report to the Auditor of Public Accounts the total amount of such spirits stored in a bonded warehouse owned, controlled or operated by such corporation, association, partnership or individual; and shall make monthly report to the Auditor of Public Accounts thereafter, which reports must be signed and sworn to by such persons, or, in case of a corporation, association or partnership, by some officer or person authorized to make such oath. The first report provided for herein shall show the number of proof gallons of such spirits withdrawn from said warehouse from the date this Act becomes effective to the date of making such report; and each monthly report thereafter shall show the number of proof gallons placed in said bonded warehouse since the date of making the last preceding report, the number of proof gallons withdrawn or transferred since the date of making the last preceding monthly report, and the aggregate number of gallons on hand at the date such report is made. In all cases where such spirits are transferred under bond from one bonded warehouse in this Commonwealth to another, said report shall show the warehouse from which same has been transferred and the warehouse to which same has been transferred, the quantity thereof and the serial number of each of the packages so transferred.

3. Every person, corporation, association or

partnership operating, owning or controlling such bonded warehouse, shall, at the time said reports herein provided for are made, pay to the Auditor of Public Accounts the tax of fifty cents per proof gallon upon each proof gallon of such spirits removed from the warehouse owned, controlled or operated by such person, corporation, association or partnership, or transferred under bond out of this state, up to the date of making such report; and for the purpose of securing the payment of the license taxes herein provided for, the Commonwealth shall have a lien on all such spirits stored in such bonded warehouses, together with the other property of the bonded warehousemen used in connection therewith; and in all cases where the spirits so removed or transferred were owned or controlled by another than the bonded warehouseman, then the bonded warehouseman shall collect and pay the tax due on such spirits so removed or transferred under bond, and shall be subrogated to the lien of the Commonwealth.

4. Every corporation, association, partnership and individual engaged in distilling spirits known as whiskey or brandy or other species of double stamp spirits in this state, shall pay the license tax herein provided upon all such spirits so manufactured and removed from the premises without being placed in a bonded warehouse at the date of the removal of such spirits; and all such corporations, associations, partnerships and individuals engaged in the business of distilling such spirits in this state shall file monthly statements with the Auditor of Public Accounts, on blanks to be furnished by the Auditor, which statements must be sworn to and which statements shall show the number of proof gallons of such spirits so distilled and removed from the premises without having been stored in a bonded warehouse, and at the time of filing such statements shall pay to the Auditor of Public Accounts the amount due on such spirits so manufactured and removed; and for the payment of the taxes due under this provision, the Commonwealth shall have a

lien upon all the machinery and the premises and the manufactured spirits made thereon, of the corporation, association, partnership or individual engaged in such distilling business.

5. Every person, corporation, association or partnership failing to make the reports herein provided for, in the manner herein provided for, and failing to pay the taxes as they become due, as herein provided for, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than five hundred dollars nor more than one thousand dollars, and each day after the date such report is due that such person, corporation, association or partnership is in default shall be treated and considered as a separate offense.

6. The tax herein provided for, when collected, shall be distributed as follows: To the State Road Fund, sixty-five per cent thereof; to the General Expenditure Fund, thirty-five per cent thereof.

7. The license tax herein imposed shall be in lieu of all other license, franchise or excise taxes now imposed by law on persons, corporations, partnerships, or associations engaged in business covered by this Act; and all Acts in conflict therewith are hereby repealed, and especially there is hereby repealed Chapter 5 of the Acts of the Special 1917 Session of the General Assembly of Kentucky.

8. Whereas, many persons, corporations, associations and partnerships are now engaged in the business covered and licensed by this Act, without paying an adequate license tax to the Commonwealth of Kentucky therefor; and whereas, the liquor which they are handling and in which they are dealing is constantly in large quantities being removed from the bonded warehouses and disposed of, without the state securing an adequate license tax thereof, an emergency is hereby declared to exist, and this Act shall take effect from and after the date of its passage and approval by the Governor."



Thereupon on the 26th day of March, 1920, the clerk issued the following summons:

### EQUITY SUMMONS

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#### THE COMMONWEALTH OF KENTUCKY

To the Sheriff of Franklin County, Greeting:

You are commanded to summon E. H. Taylor, Jr. & Sons (Inc.), to answer in 10 days after the service of the summons, a petition in Equity filed against them in the Franklin Circuit Court by S. Rosenbloom & Company, and warn them that upon failure to answer, the petition will be taken for confessed, or they will be proceeded against for contempt, and you will make due return of this summons within 10 days after the service thereof to the Clerk's Office of said Court.

Witness, KELLY C. SMITHER, Clerk of said Court, this 26th day of March, 1920.

Kelly C. Smither, Clerk  
By Bertha Moore, D. C.

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The sheriff's return on the foregoing summons is in words and figures as follows:

Executed on E. H. Taylor, Jr. and Sons, by delivering to J. Swigert Taylor, Vice-President of said company, a true copy hereof. March 26, 1920.

G. Bain Moore, S. F. C.  
By N. A. Sullivan, D. S.

On the 7th day of May, 1920, the following answer was filed:

S. Rosenbloom & Company, - - - - - Plaintiffs,

vs.

ANSWER.

E. H. Taylor, Jr. & Sons (Inc.), - - - Defendants.

The defendant, E. H. Taylor, Jr. & Sons (Inc.) for its answer herein admits that it is a corporation organized under the laws of Kentucky, and at all the times mentioned in the petition was engaged in the business of manufacturing distilled spirits known as whiskey, with distilling plant and warehouses situated in Woodford County, Ky., and home office at Frankfort, Ky. The defendant further admits that the plaintiffs in 1917 were the owners of several hundred barrels of whiskey purchased by it of the defendant, and which were stored in bulk in barrels in the warehouses of the defendant, warehouse certificates for which were issued and delivered to the plaintiffs.

That on October 14th, 1919, the defendant received directions from the plaintiff to bottle in bond for them one hundred and eighty (185) barrels and one hundred (100) barrels of their said whiskey, designating the serial numbers thereof, for the purpose of exporting same from the United States, and directed the defendant to pay all the taxes due thereon, State and County and the special tax of two (2c) cents on the gallon thereof, and thereupon the defendant transferred said barrels of whiskey under bond, or removed them into the bottled in bond warehouse in order to bottle same in bond, and as directed, paid the County and State taxes thereon for the plaintiff including the sum due the State for the two-cent tax, amounting to \$148.68, being the special tax on the 185 barrels, and the sum of \$79.12, being the said two cents on the gallon, special tax, on the 100 barrels, and which sums were paid to the State of Kentucky, as shown on its January 1st, 1920, report to the Auditor of

Public Accounts, together with other payments of a like character. It files herewith a statement of the transactions with respect to the 185 and 100 barrels, and which include the cases named in the petition as ordered for medicinal purposes, and of the detention of which complaint is made in the petition.

That for further answer, it denies that the plaintiff is entitled to the immediate possession of the two thousand (2,000) cases named in its petition.

That under the Act of the General Assembly approved March 16th, 1920, and entitled as set out in plaintiff's petition, a copy of which is filed therewith, a tax of fifty (50c) cents on each proof gallon is levied on each owner of such whiskies, engaged in the business of owning and storing such spirits in bonded Warehouses in this State, and in removing same therefrom for the purpose of sale, or for any other purpose, and that the plaintiff is so engaged and his said two thousand (2,000) cases so stored as set out in his petition, and same are apparently liable to the said fifty-cent tax, and for which tax the defendant, as warehouseman, is also liable if it permits a removal thereof unless said spirits are tax paid. And for this reason defendant admits it is interfering and preventing such removal as set out in the petition.

The defendant is informed that aside from the question of construction of the Act, that there may be a question as to the validity of said tax, and to protect itself as far as may be, submits that it is entitled to hold said whiskey until that question is determined by some Court of competent jurisdiction.

WHEREFORE, it prays to be dismissed with its costs and for all proper relief.

C. C. Turner,  
Attorney for defendant.

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The following exhibits were filed with the foregoing answer;

OLD TAYLOR—Yellow Label Registered in U. S.

E. H. TAYLOR JR. & SONS  
Incorporated

Patent Office  
Number  
53339

Frankfort, Ky. Oct. 14, 1919

Pay to the order of HENRY F. LINDSEY, ESQ., Cashier  
\$1758.50 One Thousand Seven Hundred Fifty Eight and  
50/100 Dollars

To S. Rosenbloom & Co.  
Pittsburgh, Pa.

E. H. TAYLOR JR. & SONS  
Incorporated  
By J. S. Taylor, C. President.

Copy of Draft  
on Rosenbloom & Co.  
Copy Attest  
J. H. Lutkemeier

Folio——— Statement

Frankfort, Ky. April 14, 1919.  
Messrs. S. Rosenbloom & Co.,  
Pittsburgh, Pa.

In account with  
E. H. TAYLOR JR. & SONS  
Incorporated  
DISTILLERS.

Charges	1141.13	
do	636.45	1777.58
Credit		
Excess allowance	9.18	
“ “	9.90	19.08
Draft this day		1758.50

E. H. TAYLOR JR. & SONS  
Incorporated  
DISTILLERS.

Frankfort, Ky. Oct. 14, 1919.

In account with Messrs. S. Rosenbloom & Co.

Order No. 10-34

Pittsburgh, Pa.

Tax &c. on 185 Bbls. Feby. & Mch. 1915 "Old Taylor"  
Serial Nos. 174842/56, 175842/46, 175672/86,  
176742/86

7433.9 tax galls. @

State and County Texas	179.41
135-56	378.00
Months' Storage @ 5c per bbl.	
50-55 per mo.	137.50
Special State Tax 7433.9 galls. @ 2c	148.68
Hauling and Handling Excess 43.6	279.04
Ex Stamps	18.50

1141.13

We make draft Excess 9.18

For \$ , which please honor

Bill of Lading Will Follow

Warehouse Receipt for Barrels, Serials

, Herewith Eclosed.

Copy Attest:

J. H. Lutkemeier

CREDIT MEMORANDUM

E. H. TAYLOR JR. & SONS  
Incorporated  
DISTILLERS.

Frankfort, Ky. Oct. 14, 1919.

Messrs. S. Rosenbloom & Co.,  
Pittsburgh, Pa.

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We have credited your account for EXCESS on 185 barrels 1915 "TAYLOR" Whiskey

174842	174856
175832	175846

Serials 175672 to 175686 as follows, viz:

176742	176786	
176787	176831	
177077	177126	
5.1 proof gallons at \$		\$4.57
5.1 tax gallons at \$1.10		5.61

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\$9.18

This amount will be deducted from Draft

Copy Attest  
J. H. Lutkemeier

E. H. TAYLOR JR. & SONS  
Incorporated  
DISTILLERS.

Frankfort, Ky., Oct. 14, 1919

In account with Messrs. S. Rosenbloom & Co.,  
Pittsburgh, Pa.

Order No. 10-34

Tax &c. on 100 Bbls. Meh. 1915 "Old Taylor"

Serial Nos. 177127/76, 177177/186, 177302/41  
3956.0 tax galls @

State and County Taxes	96.97
55 Months' Storage, @ 5c per bbl. per mo.	275.00
Special State Tax 3956.0 galls @ 2c	79.12
Excess 27.4	175.36
Export Stamps	10.00
Excess 9.90	636.45

We Make Draft

For \$ , which Please Honor

Bill of Lading Will Follow

Warehouse Receipt for Barrels, Serials

, Herewith Enclosed.

Copy Attest:

J. H. Lutkemeier.

CREDIT MEMORANDUM

E. H. TAYLOR JR. & SONS

Incorporated

DISTILLERS.

Frankfort, Ky. Oct. 14, 1919.

M. S. Rosenbloom & Co.,  
Pittsburgh, Pa.

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We have credited your account for EXCESS on 100 barrels 1915 "TAYLOR" Whiskey

	177127	177176	
Serials	177177 to	177186,	as follows, viz:
	177302	177341	
	5.5 proof gallons at \$ .70		\$3.85
	5.5 tax gallons at \$1.10		6.05

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\$9.90

This account will be deducted from Draft

Copy Attest  
J. H. Lutkemeier

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On the 7th day of May, 1920, the following reply and cross-petition was filed:

S. Rosenbloom & Company, Plaintiffs,

vs. REPLY AND CROSS-PETITION.

E. H. Taylor, Jr. & Sons, Defendants.

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1. For reply the plaintiff denies that the two thousand cases of whiskey herein are liable to the said fifty-cent tax, and for which tax the defendant, E. H. Taylor,



Jr. & Sons, is liable if it permits a removal thereof unless said spirits are tax paid.

2. The plaintiff admits that the whiskey involved herein is under the terms of the Act mentioned and set out by the defendant in its answer, apparently liable to the fifty-cent tax imposed by that Act, but the plaintiff says the said Act of the General Assembly of Kentucky, approved March 16th, 1920, and entitled

“AN ACT imposing an annual license tax upon every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits known as whiskey or brandy or other species of double stamp spirits in this State, and upon every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in this state, and in removing same therefrom for the purpose of sale, or for any other purpose; providing for monthly reports by distilleries and bonded warehousemen, for the purpose of ascertaining the amount of tax due; providing for monthly payments of the amount of license tax due; fixing a penalty for failure to make such monthly report and settlement; providing for the manner of distribution of the taxes so collected; repealing all other license, franchise and excise taxes on the business covered by this Act; and declaring an emergency to exist.”

is unconstitutional and an illegal and unlawful exaction and unlawful exercise of Legislative power.

That it is a revenue measure purely though raised by a license tax and is confiscatory in its character and sense, and imposes a tax wholly out of proportion to the value of the license conferred and of the article taxed, and said exaction is beyond the limits of any reasonable profit derivable from the manufacture and sale of the article taxed, or the cost of regulation and licensing such manufacture and sale. That the basic commercial value of whiskey generally is about One Dollar per gallon.

That said Act violates the constitution of the State of Kentucky, and particularly Sections 171 and 172

thereof requiring uniformity of taxation within the territorial limits of the authority imposing the tax.

That said tax is discriminatory in its nature and adds a greater burden on whiskey than on other personal property, and property of like value, and on business and occupations of equal and like character and value, and no such confiscatory and discriminatory tax is imposed on owners or holders of similar property in other states and who are competitors with plaintiff in the business named.

That an enforcement of said Act will result in taking private property for public purposes without just compensation and without due process of law, and deprives the owners of such property and warehousemen in charge thereof the equal protection of the law in violation of the 14th Amendment of the Constitution of the United States.

That the defendant, John J. Craig, is the Auditor of Public Accounts in and for the Commonwealth of Kentucky, and is charged with the duty of requiring the reports provided for under said Act, and further charged on behalf of the State with the collection of said tax, and is threatening to and is about to collect same by requiring said reports and subjecting the plaintiff to indictment and heavy fines and penalties for failing to report and pay said tax as provided in said Act, and is threatening to institute civil actions as well to require said reports and enforce said collection, and said Craig has demanded of the plaintiff, as well as of the defendant, the payment of said tax on the whiskey in question, and which tax the plaintiff admits the defendant, E. H. Taylor, Jr. & Sons, is likewise liable for under the terms of said Act. That the said defendant, Craig, as Auditor, has warned the plaintiff, and presumably the defendant, that if said whiskey is removed from the warehouse where it is now stored they will be proceeded against forthwith for the collection of said tax, and the enforcement of the penalties imposed by the Act.

That Honorable Chas. I. Dawson is the Attorney General of the Commonwealth of Kentucky, and the head of its legal department, and charged with the

duty of enforcing said Act of March 16, 1920, and is threatening to enforce same, and the penalties therein provided, and will do so unless enjoined.

The plaintiff charges that the defendants, John J. Craig, as Auditor aforesaid, and Charles I. Dawson, Attorney General, are the proper and necessary parties hereto, and this Court is asked that they be made such parties and that process of this Court be issued against them, and they are now made such parties and process is asked against them. That the Hon'ble Robert. L. Stout is now absent from this county and that no injunction herein against the prosecution of this action has been refused by the Court or other Circuit Judge.

The plaintiff says that unless the defendants, Chas. I. Dawson, Attorney General, and John J. Craig, the defendants, are made parties hereto, and are immediately enjoined and restrained from enforcing said Act of March 16, 1920, and from requiring the plaintiff and the defendant, E. H. Taylor, Jr. & Sons, from reporting and paying the taxes on said whiskey the plaintiff will suffer great and irreparable injury, and especially so from the delay in giving notice of this application and plaintiff has no remedy at law available to him to prevent said injury and wrong.

WHEREFORE, the plaintiff prays that Chas. I. Dawson, Attorney General, and the said John J. Craig, Auditor, aforesaid, be made parties defendants hereto on behalf of the Commonwealth of Kentucky, and that said cross-defendants be enjoined and restrained from requiring said reports of said whiskey to be made and from collecting the said fifty-cents per gallon tax thereon, and from enforcing the provisions of the Act of March 16, 1920, and that the plaintiff be allowed to remove his whiskey without the payment of said tax and that said Act of March 16th, 1920, be held to be invalid and unconstitutional, and for judgment for costs and all proper relief.

Hazelrigg & Hazelrigg  
For plaintiffs.

STATE OF KENTUCKY }  
COUNTY OF FRANKLIN } Set:

Affiant, J. H. Hazelrigg, says that he is the attorney of plaintiff, S. Rosenbloom & Company, who is absent from this county and that the statements of the foregoing reply and cross-petition are true.

J. H. Hazelrigg.

Subscribed and sworn to before me by J. H. Hazelrigg, this 8th day of May, 1920.

Kelley C. Smither

C. F. C. C.

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At a court held on the 8th day of May, 1920, the following order was entered:

S. Rosenbloom & Co., - - - - - Plaintiff,  
vs.

E. H. Taylor, Jr. & Sons, &c., - - - - - Defendants.

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Came plaintiff by attorney and filed amended petition.

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The amended petition referred to in the foregoing order is in words and figures as follows:

S. Rosenbloom & Company, - - - - - Plaintiffs,  
vs. AMENDED PETITION.

E. H. Taylor, Jr. & Sons (Inc.) &c., - - - Defendants.

---

The plaintiff for amendment to his original petition, says that the Act of the General Assembly of Kentucky, approved March 16th, 1920, and entitled:

"AN ACT imposing an annual license tax upon every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits known as whiskey or brandy or other species of double stamp spirits in this State, and upon every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in this state, and in removing same therefrom for the purpose of sale, or for any other purpose; providing for monthly reports by distilleries and bonded warehousemen, for the purpose of ascertaining the amount of tax due; providing for monthly payments of the amount of license tax due; fixing a penalty for failure to make such monthly report and settlement; providing for the manner of distribution of the taxes so collected; repealing all other license, franchise and excise taxes on the business covered by this Act; and declaring an emergency to exist,"

is unconstitutional and an illegal and unlawful exaction and unlawful exercise of legislative power.

That it is a revenue measure purely though raised by a license tax and is confiscatory in its character and sense, and imposes a tax wholly out of proportion to the value of the license conferred and of the article taxed, and said exaction is beyond the limits of any reasonable profit derivable from the manufacture and sale of the article taxed, or the cost of regulation and licensing such manufacture and sale. That the basic commercial value of whiskey generally is about One Dollar per gallon.

That said Act violates the constitution of the State of Kentucky, and particularly Sections 171 and 172, thereof requiring uniformity of taxation within the territorial limits of the authority imposing the tax.

That said tax is discriminatory in its nature and adds a greater burden on whiskey than on other personal property, and property of like value, and on business and occupations of equal and like character and value, and no such confiscatory and discriminatory tax is imposed on owners or holders of similar property in other states

and who are competitors with plaintiff in this business named.

That an enforcement of said Act will result in taking private property for public purposes without just compensation and without due process of law, and deprives the owners of such property and warehousemen in charge thereof the equal protection of the law in violation of the 14th Amendment of the Constitution of the United States.

That the defendant, John J. Craig, is the Auditor of Public Accounts in and for the Commonwealth of Kentucky, and is charged with the duty of requiring the reports provided for under said Act, and further charged on behalf of the State with the collection of said tax, and is threatening to and is about to collect same by requiring said reports and subjecting the plaintiff to indictment and heavy fines and penalties for failing to report and pay said tax as provided in said Act, and is threatening to institute civil actions as well to require said reports and enforce said collection, and said Craig has demanded of the plaintiff, as well as of the defendant, the payment of said tax on the whiskey in question, and which tax the plaintiff admits the defendant, E. H. Taylor, Jr. & Sons, is likewise liable for under the terms of said Act. That the said defendant, Craig, as Auditor, has warned the plaintiff, and presumably the defendant, that if said whiskey is removed from the warehouse where it is now stored they will be proceeded against forthwith for the collection of said tax, and the enforcement of the penalties imposed by the Act. That Honorable Charles I. Dawson is the Attorney-General of the Commonwealth of Kentucky, and the head of its legal department and charged with the duty of enforcing said Act of March 16th, 1920, and is threatening to enforce same and the penalties therein provided by civil actions and by indictments and other criminal proceedings, therein provided, and will do so unless enjoined.

The plaintiff charges that the defendants, John J. Craig, as Auditor aforesaid, and defendant, Charles I. Dawson, Attorney-General, are proper and necessary parties hereto, and this Court is asked that they be made such parties and that process of this Court be issued

against them, and they are now made such parties and process is asked against them. That the Honorable Robert L. Stout, Circuit Judge of this County, is now absent from this county and that no injunction herein against the prosecution of this action has been refused by this court or other Circuit Judge.

The plaintiff says that unless the defendants, Charles I. Dawson, Attorney-General, and John J. Craig, Auditor, are made parties hereto, and are enjoined and immediately restrained from enforcing said Act of March 16th, 1920, and from requiring the plaintiff and the defendant, E. H. Taylor, Jr. & Sons, from reporting and paying the taxes on said whiskey the plaintiff will suffer great and irreparable injury and especially so from the delay arising in giving notice of this application, and plaintiff has no remedy at law available to him to prevent said injury and wrong.

WHEREFORE, the plaintiff prays that Charles I. Dawson, Attorney-General, and said John J. Craig, Auditor aforesaid, be made parties defendants hereto on behalf of the Commonwealth of Kentucky, and that said cross-defendants be enjoined and restrained from requiring said reports of said whiskey to be made and from collecting the said fifty-cent per gallon tax thereon, and from enforcing the provisions of the Act of March 16th, 1920, or its penalties by civil actions or by indictments or otherwise, and that the plaintiff be allowed to remove his whiskey without the payment of said tax and that said Act of March 16th, 1920, be held to be invalid and unconstitutional, and for judgment for costs and all proper relief.

Hazelrigg & Hazelrigg  
For plaintiff.

State of Kentucky }  
Franklin County } Set:

Affiant, J. H. Hazelrigg, says that he is the attorney for plaintiff, S. Rosenbloom & Company, who is absent from the county and that the statements of the foregoing amended petition are true.

J. H. Hazelrigg.

Subscribed and sworn to before me by J. H. Hazelrigg this——day of May, 1920.

On the 12th day of May, 1918, the following summons was issued by the clerk:

### EQUITY SUMMONS

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#### THE COMMONWEALTH OF KENTUCKY

To the Sheriff of Franklin County, Greeting:

You are commanded to summon John J. Craig, Auditor Public Accounts for the State of Kentucky, and Charles I. Dawson, Attorney General of the State of Kentucky, to answer in 10 days after the service of the summons, reply and cross-pet. and an amended petition in Equity filed against them in the Franklin Circuit Court by S. Rosenbloom & Co. and warn them that upon failure to answer, the reply and cross-petition and amended petition will be taken for confessed, or they will be proceeded against for contempt, and you will make due return of this summons within 10 days after the service thereof to the Clerk's Office of said Court.

Witness, KELLY C. SMITHER, Clerk of said Court, this 12th day of May, 1920.

Kelly C. Smither, Clerk  
By Bertha Moore, D. C.

---

The sheriff's return on the foregoing summons is in words and figures as follows:

Executed on John J. Craig, Auditor of Public Accounts for the State of Kentucky, and Charles I. Dawson, Attorney General of the State of Kentucky, by delivering a true copy hereof to each one of them May 12, 1920.

G. Bain Moore, S. F. C.  
By N. A. Sullivan, D. S.



On the 12th day of May, 1920, the clerk issued the following temporary restraining order:

S. Rosenbloom & Company, - - - - - Plaintiffs,

vs.      TEMPORARY RESTRAINING ORDER.

E. H. Taylor, Jr. & Sons (Inc.) &c., - - - Defendants.

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THE COMMONWEALTH OF KENTUCKY,

To defendants, Charles I. Dawson, Attorney General, and John J. Craig, Auditor of Public Accounts of the State of Kentucky:

You are hereby enjoined from requiring from the plaintiff or his agents or distiller in charge, payment of the fifty-cent per gallon license tax on his whiskies described in the petition and stored in bond in the Old Taylor warehouses in Woodford County, Kentucky, and which tax is attempted to be imposed thereon under an act of the General Assembly of Kentucky, approved March 16th, 1920, and from enforcing said act or its penalties by suit or indictment or otherwise, until the further orders of the court.

Witness, KELLY C. SMITHER, Clerk of the Franklin Circuit Court this 12th day of May, 1920.

Kelly C. Smither, C. F. C. C.

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The sheriff's return on the foregoing is in words and figures as follows:

Executed on Charles I. Dawson, Attorney General of the State of Kentucky, and John J. Craig, Auditor Public Accounts for the State of Kentucky, by delivering a true copy hereof to each one of them. May 12th, 1920.

G. Bain Moore, S. F. C.  
By N. A. Sullivan, D. S.

COMMONWEALTH OF KENTUCKY }  
COUNTY OF FRANKLIN } Set.

I, Kelly C. Smither, Clerk of the Franklin Circuit Court in and for the County and State aforesaid, do hereby certify that the foregoing thirty (30) pages contain a full, true and complete transcript of the record and proceedings to this date, in the case wherein S. Rosenbloom & Co. is plaintiff and E. H. Taylor, Jr. & Sons is defendant. No. 30872, an action lately pending in the aforesaid court as the same appears of record and now on file in my office.

Witness my hand as clerk aforesaid, this 4th day of June, 1920.

(SEAL) Kelly C. Smither,  
Transcript fee \$11.35 Clerk Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY )  
County of Franklin )

I, Robert L. Stout, Judge of the Fourteenth Judicial District of Kentucky, and ex-officio Sole Judge of the Franklin Circuit Court, do hereby certify that Kelly C. Smither, who signed the foregoing certificate, is now, and was at the time of signing the same, Clerk of said Court, duly elected, qualified and sworn; that his said signature is in his own genuine and proper handwriting, and that said certificate and authentication are in due form of law.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and caused the seal of said court to be hereunto affixed at Frankfort, Kentucky, this——day of June, 1920.

(SEAL)

Judge of Fourteenth Judicial  
District of Kentucky.

**No. 937.**

**ORDER**—Entered and Filed June 4, 1920, J. W. Menzies,  
U. S. Clerk, by Chas N. Wiard, D. C.

**At a Court held June 4, 1920.**

This day came the plaintiff, by counsel, pursuant to notice heretofore given, and moved the Court for an interlocutory injunction in accordance with the prayer of its bill. Thereupon came the defendants and filed a motion to dismiss the bill, for the reason that the same does not state facts sufficient to support a cause of action against them, or any of them; and a further motion to dismiss plaintiff's bill because of lack of equity therein, and because plaintiff has a full, complete and adequate remedy at law; and the defendants entered a further motion to stay proceedings herein, by virtue of a stay having been issued against them in a proceeding pending in the Circuit Court of Franklin County, Kentucky, wherein S. Rosenbloom & Company are plaintiffs and E. H. Taylor, Jr. & Sons, John J. Craig, Auditor of the Commonwealth of Kentucky, and Charles I. Dawson, Attorney General of the Commonwealth of Kentucky, are defendants; and the defendants filed with this motion a certified copy of the record of said action pending in the Franklin County Circuit Court.

As this is an action wherein an interlocutory injunction is sought to prevent State officials from enforcing a State taxing statute, the District Judge is required to call to his assistance on said hearing two other Judges, as provided by Section 266 of the Ju-

dicial Code. For this purpose the District Judge has invited to sit with him, for the purpose of hearing the motion for an interlocutory injunction in this case, A. C. Denison, Circuit Judge, and Walter Evans, District Judge, and the hearing is fixed for the 17th day of June, 1920, at 9½ o'clock A. M., at Lexington, Ky.

By agreement of counsel, it is further ordered that the motion be submitted upon brief of counsel, which must be filed in triplicate with the Clerk of the District Court for the Eastern District of Kentucky, on or before the said 17th day of June, 1920.

A. M. J. Cochran, Judge.

We approve the above order.

CHAS I. DAWSON,

*Atty. General, Counsel for Defendants.*

June 4, 1920.

THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF  
KENTUCKY.

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KENTUCKY DISTILLERIES Co., - - - *Complt.*,  
*vs.*  
CHAS. I. DAWSON, ET AL., - - - *Defts.*

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Motion for Preliminary Injunction,  
Before DENISON, Circuit Judge, EVANS and  
COCHRAN, District Judges:

*Per Curiam*

This motion involves the question considered in the recent *Freiberg* case, in the Western District—except the matter of value per gallon, an issue not raised in this case.

As we are all of the opinion that the tax is really a property, and not an excise tax, it is unnecessary to consider the additional grounds now urged for injunction. We file a copy of the opinion in the *Freiberg* case, and adopt it—except for the matter of the confiscatory character of the tax—for the purposes of this case. There should be injunctions and bonds as there provided.

June 17, 1920.

A. C. DENISON,  
*Circuit Judge,*  
WALTER EVANS,  
A. M. J. COCHRAN,  
*District Judges.*

THE DISTRICT COURT OF THE UNITED  
STATES FOR THE WESTERN DISTRICT  
OF KENTUCKY, IN EQUITY.

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THE J. A. FRIEBERG COMPANY (In-  
corporated), - - - - - *Plaintiff,*  
*vs.*

LOUISVILLE PUBLIC WAREHOUSE COMPANY,  
JOHN J. CRAIG, AUDITOR, AND CHARLES  
I. DAWSON, ATTORNEY GENERAL OF  
KENTUCKY, - - - - - *Defendants.*

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Motion for preliminary injunction. Before DENI-  
SON, Circuit Judge, and EVANS and SATER, District  
Judges. Decided May 31, 1920.

Section 171 of the Kentucky Constitution pro-  
vides that taxes "shall be uniform upon all property  
of the same class subject to taxation." Section 172  
says that all property shall be assessed for taxation  
at its fair cash value. Section 174 directs that all  
property shall be taxed in proportion to its value,—  
without prejudice to the right to provide for taxation  
based on income, licenses or franchises. Section 181  
says: "The General Assembly may, by general laws  
only, provide for the payment of license fees on fran-  
chises \* \* \* the various trades, occupations and  
professions, or a special or excise tax."

Prior to 1917, such license taxes as there were on  
manufacturing or wholesale dealing in distilled spir-  
its had been by way of an annual tax of a fixed sum.  
In 1917, in the course of a general revision of the

revenue laws of the state, it was provided by Chapter 5 of the Acts of 1917, that every corporation or person engaged in the business or occupation of manufacturing distilled spirits, and every owner or proprietor of a bonded warehouse in the state, in which such spirits are stored, should, in addition to other taxes, pay a license tax of two cents on every proof gallon liable to Federal tax; that every distiller and every bonded warehouseman should make quarterly reports showing the amount of distilled spirits removed from the warehouse by payment of the Federal tax or transferred under bond during the quarter, and at the time of making the report pay the tax of two cents per gallon. The proceeds of the tax were distributed, twenty per cent to the road fund, thirty per cent to the school fund and fifty per cent to the general fund.

In January, 1920, when the Eighteenth Amendment to the Federal Constitution was declared to take effect, there remained in storage in bonded warehouses, in Kentucky, approximately 50,000,000 gallons of distilled spirits, and there was approximately the same amount (probably somewhat more) in storage in bond in the remainder of the United States.

On March 12, 1920, the Governor approved an act of the General Assembly repealing Chapter 5 of 1917, and substituting a revision of generally similar purport. The first section thereof, as so revised, is as follows:

“Every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits, known as whiskey or brandy or other

species of double stamp spirits, in this State; and every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in this State, and in removing same therefrom for the purpose of sale, or for any other purpose, shall pay an annual license tax to the Commonwealth of Kentucky of fifty cents on every proof gallon of said distilled spirits so manufactured or stored in a bonded warehouse, or withdrawn from a bonded warehouse, or transferred therefrom under bond out of the Commonwealth of Kentucky."

Section 2 directed that every owner of a bonded warehouse should make to the State Auditor a monthly report, on the first of each month, showing the number of proof gallons withdrawn or transferred since the last report. Section 3 directed the warehouseman, at the time of making each monthly report, to pay to the Auditor fifty cents upon each proof gallon which had been removed from the bonded warehouse or transferred under bond out of the state, and further provides:

"and for the purpose of securing the payment of the license taxes herein provided for, the Commonwealth shall have a lien on all such spirits stored in such bonded warehouses, together with the other property of the bonded warehouseman used in connection therewith; and in all cases where the spirits so removed or transferred were owned or controlled by another than the bonded warehouseman, then the bonded warehouseman shall collect and pay the tax due on such spirits so removed or transferred under bond, and shall be subrogated to the lien of the Commonwealth."

Section 4 required that every distiller pay this license tax upon the product of his manufacture



when removed from his premises, unless then placed in a bonded warehouse; that all distillers shall file a monthly statement with the Auditor showing the amount of spirits so removed and not going into a bonded warehouse, and at the same time pay the specified license tax thereon. Section 5 provides that every person or corporation failing to make reports as directed, and failing to pay the taxes as they become due, shall be guilty of a misdemeanor, and upon conviction be fined not less than \$500 nor more than \$1,000, and that each day that such taxpayer is in default after the date such report is due "shall be considered and treated as a separate offense." Section 6 gives the proceeds of the tax, sixty-five per cent to the road fund and thirty-five per cent to the general fund. Section 7 declares that the license tax of the statute shall be in lieu of all other license, franchise or excise taxes now imposed by law on persons or corporations engaged in business covered by this Act; and repeals Chapter 5 of 1917. Section 8 recites that, whereas, the business covered and licensed by the Act is not now paying an adequate license tax, and, whereas, liquor in bonded storage is being removed from the bonded warehouses and disposed of without the receipt by the state of adequate license tax, "an emergency is hereby declared to exist, and this act shall take effect from and after the date of its passage and approval by the Governor."

The plaintiff, which is an Ohio corporation, in October, 1916, purchased from the distiller warehouse receipts covering 9,800 proof gallons of whiskey, original gauge, and upon the purchase of these

certificates, became and remained the owner of this whiskey which continued in the distiller's bonded warehouse until January, 1920, when it was transferred to a bonded warehouse operated by the Louisville Public Warehouse Company. Thereby, the plaintiff has had, and it has, such constructive possession of the whiskey as the federal laws contemplate before the federal tax is paid.

In April, 1920, plaintiff desired to have this liquor transferred, under the existing federal regulations which permit such transfer, to another bonded warehouse in the state of Massachusetts, and directed the Louisville Public Warehouse Company to proceed with such transfer, at the same time tendering payment to the Warehouse Company of all storage charges, *ad valorem* taxes, and all other payments attending such transfer and claimed to be proper, excepting the fifty cents license fee under the Act of 1920. The Warehouse Company refused to permit such withdrawal and transfer, for the sole reason that the fifty cent tax had not been paid, and claimed a lien upon the whiskey to secure such payment.

Thereupon, plaintiff filed this bill against the Warehouse Company and against the State Auditor and the State Attorney General, alleging that the Warehouse Company was unlawfully refusing to make the transfer and that the state officers were threatening to enforce this law and the penalties thereof against plaintiff and the Warehouse Company, and asking that the Warehouse Company be enjoined from further refusing to make the transfer or from further asserting any lien for this fifty cent tax;

that the state officers be enjoined from any step attempting to enforce the act or the lien thereof, and that the Attorney General be enjoined from instituting any action, civil or criminal, to coerce the payment of this tax, or to collect the penalties or fines prescribed in the act. A motion for preliminary injunction was made, and the District Judge, proceeding under Sec. 266 of the Judicial Code, caused the motion to be heard before the court as now constituted.

Several questions are involved, and it is not feasible to discuss all of them exhaustively. As to several of them, we state only our conclusions; as to some, we add the reasons which induce the conclusion.

1. *Jurisdiction of this court as a federal court.*

This is clear, first, because the bill shows diverse citizenship with more than \$3,000 involved in money values; and, second, because the bill states a case of rights arising under the Fifth Amendment to the Federal Constitution. It is well-settled that, in the latter case, the federal court has jurisdiction if the claim of federal right is made in good faith and is not frivolous, even though in the end it may turn out to be erroneous.

2. *Case arising under Sec. 266, Judicial Code.*

Two state officers are made parties defendant, and an injunction is sought to prevent them from enforcing the law of the state, which law is said to be unconstitutional. The tax law does not seem to impose

upon the auditor any duty of enforcement, nor is it clear that he can do anything which would be harmful enough to call for an advance prohibition. As to the attorney general, the case is different. While this statute does not require him to act, it seems to be understood by all parties, including the attorney general himself, that it is his official duty to enforce the law by bringing, on behalf of the state, all actions and by enforcing all penalties which the law provides for. The bill alleges that he intends to enforce these penalties, and he does not dispute this allegation. The matter has proceeded upon the assumption by the district judge of the district and by all parties, that the case is one contemplated by Sec. 266; and we see no reason to hesitate on this account.

### 3. *Abatement under Sec. 266.*

By the amendment of March 4th, 1913, it was provided by way of amendment to this section, that proceedings thereunder in any federal court should be stayed pending the determination of the question in the state courts, if

"a suit shall have been brought in a court of the state having jurisdiction thereof under the laws of the state to enforce such statute or order, accompanied by a stay in such state court of proceedings under such statute or order pending the determination of such suit by such state court."

The attorney general shows, by way of abatement or stay of the present application, that a suit has been brought by another owner of whiskey, in a situation analogous to that of plaintiff here, against an-

other warehouseman, the purpose of the suit being to compel the delivery of the whiskey to the plaintiff, who had paid the government tax, and against which delivery the warehouseman was urging that it must collect the fifty cent tax under the law now in question. After the defendant had answered and set up this law and claimed that it ought to be entitled to keep the whiskey until the validity of the law was determined by some competent court, the plaintiff in that case filed an amended petition asking an injunction against the state auditor and the state attorney general to prevent them from enforcing this act; thereupon, an injunction issued in that suit enjoining them "from requiring from the plaintiff, or his agent or distiller in charge, payment of the fifty cent per gallon tax \* \* \* until further orders of the court."

We pass by a serious question as to whether this injunction is valid, and, for present purposes, assume that it is. It does not present such a case as is contemplated by the amendment of March 4, 1913, to Sec. 266 of the Judicial Code. This is for two reasons: The first is that the state court which issued this injunction is not the state court contemplated by the amendment. The action of the federal court is to be superseded or suspended only in case—as we read the statute—"a suit to enforce such statute or order shall have been brought in a court of the State having jurisdiction thereof under the laws of such state"; and while it is said that this particular state court has jurisdiction to enforce this law because it is the court in which the state might rightfully bring suit

to collect penalties, it is entirely plain that the suit which has been brought was not brought to enforce this law. The attorney general would escape this conclusion by saying that the clause "to enforce such statute or order" is dependent upon and defines the word "court," and not the word "suit." This construction is not only—as it seems to us—awkward and unnatural, but it leaves the word "thereof" superfluous and without meaning, and leaves the word "suit" going at large without definition. According to this construction, if only the suit is brought in a court which has jurisdiction to enforce this law, it makes no difference what kind of a suit or what it is about.

The second reason why the amendment of March 4, 1913, does not apply is that it contemplates a stay which will protect against the enforcement of the law the plaintiff who, in the Federal Court, is seeking the injunction. It is manifest that the stay which only prohibits the attorney general from enforcing the law against another plaintiff in another case, can not protect this plaintiff in this case, and Congress could not have intended to oust the jurisdiction of the Federal courts, excepting where the state courts were providing an adequate substitute. The reasons assigned to Congress for the enactment of this amendment, as shown in the report of the House Judiciary Committee, February 27, 1913, Report No. 1584, indicate that it was intended to reach only those cases where the enforcement by the state was through a court action, brought by some administrative body, for specific performance of the law; but

however that may be, and if the amendment might be invoked when its application was based upon some other kind of an action for some other kind of enforcement of a law, there at least must be identity between the party claiming protection in the federal court and the party who is receiving protection in the state court.

Therefore, considering the papers filed by the attorney general on this subject as a plea in abatement, it must be overruled, and considering them as answers to plaintiff's motion for an injunction, they are insufficient.

4. *Jurisdiction of this court as a court of equity.*

Obviously, equity has no jurisdiction, except upon the theory that an injunction is necessary; and an injunction will not be awarded, if there is an adequate remedy at law. The vital question, then, is, "Is there an adequate remedy at law"? and, to answer this in the affirmative, we must know what that remedy is.

(a) It is said that the tax may be paid under protest, and that, if the law turns out to be invalid, it will be the duty of the auditor to make a state warrant for repayment, and that this duty will be enforced by mandamus proceedings. If this remedy were clear and certain, it might be "adequate" (\*); but its existence is at least doubtful. "As a general rule, payment merely under protest, unless some stat-

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\**Dow v. Chicago*, 11 Wall. 108, 112; *Indiana Co. v. Koehne*, 188 U. S. 681; *Boise Co. v. Boise City*, 213 U. S. 276, 282; *Singer Co. v. Benedict*, 229 U. S. 481, 487.

ute expressly provides, is voluntary payment, and suit for recovery will not lie even if there is a defendant who can be sued. This taxing statute does not provide for payment under protest, and does not provide for suing the state to get the money back, even if payment were made to release a levy and so were compulsory. The existence of this remedy can depend only on Sec. 162 of the Kentucky Statutes.

This section authorizes the refunding warrant in cases where a tax, which was paid, was "not due"; and a later clause makes reference to "the mistaken payment." In a broad sense, taxes which are invalid because the taxing act is unconstitutional, are "not due"; but the Kentucky Court of Appeals has not yet construed the statute as extending to such a case (\*). It has been held not to reach cases where the assessment, made by some board or assessing officers, was invalid on account of their violation of law, and this holding has been put upon the ground that the auditor could not review the action of the assessing officers and determine its validity. On the other hand, cases where the question was whether a tax should be paid under one statute or under another or under both, have been held within the scope of the section. It has been at least strongly intimated that plaintiff can not demand this warrant unless he paid the tax under the compulsion of distraint or a right of distraint and under a mistake of law or fact. Taxes paid merely under protest can not be recovered

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\**German v. Coulter*, 112 Ky. 577; *Louisville v. Coulter*, 112 Ky. 584; *Bosworth v. Metropolitan*, 162 Ky. 344; *Louisville v. Bosworth*, 169 Ky. 824; *Greene v. Taylor*, 184 Ky. 739; *Craig v. Security* (March 9, 1920).



without express provision of law, since mandamus will lie only to compel performance of a plain duty, and since, to require the Auditor, at his peril to determine the unconstitutionality of a legislative act, is to put upon him an extraordinary burden, we must have grave doubt whether this remedy exists. Certainly, the state of the Kentucky decisions does not justify us in saying it is so clear and effective as to be "adequate," in the sense of the fundamental equity requirement. Further, the remedy is by mandamus, a discretionary writ; the plaintiff is entitled to his adequate remedy in the Federal court (*U. S. Life Ins. Co. v. Cable*, C. C. A. 7, 98 Fed. 761), and a Federal court will mandamus a state officer only in clearest case. It seems a paradox that a court should refuse an injunction and thus permit an act to be done, and then issue a mandamus to compel its undoing.

(b) Another suggested remedy is that the plaintiff pay the Warehouse Company the tax and immediately sue to recover it back. As to this, it could be answered, first, that a lien given by an unconstitutional law is no lien, and, hence, payment by plaintiff, in order to get possession of his property, would not be compelled by the lien, would be voluntary and suit to recover it back would be defeated for that reason (\*). It could be answered, second, that as soon as the first day of the next month arrived and the Warehouse Company did not pay the tax over to the State, penalties would accrue against the ware-

\*We assume that, if the law is valid, there is a lien effective against the withdrawing owner, though that is not clear. See *infra*.

house company at the minimum rate of \$500 per day, and the pendency of the law suit would be no defense against those penalties. Further, plaintiff, in case of failure, would be liable, perhaps directly to the State, for the same penalties, and at least liable over to the warehouse company for their amount. Still further, the warehouseman's personal responsibility may be insufficient.

(c) The same matter of accruing penalties applies to an action of replevin against the warehouseman, after tender of valid charges and claims—if that action would otherwise be appropriate under the Kentucky practice.

No one of these suggested remedies accompanied by such contingencies is “adequate” (*Davis v. Wakelee*, 156 U. S. 680, 688; *Walla Walla v. Walla Walla Co.*, 172 U. S. 1, 12; *Union Pacific Co. v. Weld*, 247 U. S. 282, 285).

5. *If the plaintiff is right upon the merits, is there that imminent irreparable injury which alone justifies a preliminary injunction?*

This is, in part, the same question as to whether there is an adequate remedy, but it goes further.

It is not to be doubted that the extravagant and oppressive penalties which accumulate under the law, so that no one could ever refuse payment during the length of time necessary to carry through a test suit, demonstrate irreparable injury under the rule of *Ex parte Young*, 209 U. S. 123, and similar cases, except for two considerations which are said to distinguish,

The first is that this section of the statute imposing these penalties may be considered as separable and, if obnoxious to controlling principles, may be considered as invalid without affecting the rest of the law—whereby a suit for penalties could be defeated. In advance of a decision by the Kentucky courts, we can not be assured that this provision is separable. It is the only effective means which the state has for enforcing the law and collecting the tax. We can not see that the state has any compelling lien. Taxes are not payable until the first of the month after the liquor is withdrawn from the warehouse, and when the liquor is so withdrawn and removed from the state, as the statute contemplates, no effective lien in favor of the state can remain. In those cases where the warehouseman owns the liquor, the purported lien thereon is plainly ineffective in the tax collection. The effect of the statute might be such, if some difficulties of construction are overlooked, as to give the warehouseman a lien and compel the payment of the tax to pay him before he surrenders the liquor to the owner, but this would not help the state any in collecting from the warehouseman; it would have no weapon, except the penalties, and a lien upon the warehouse which might be of little comparative value.

When we compare the Act of 1920 with that of 1917, we find that the earlier one provided that the Auditor should bring suit to collect the tax, with an eight per cent penalty and with all other interest and penalties provided for delinquent taxes in other cases. The revisers omitted these provisions and substituted only the declaration in Sec. 5 that each day of

default shall be a separate offense. The legislative intent to regard this extreme penalty as essential is fairly clear. At least, we cannot presume that the Kentucky Legislature would have regarded this statute as sufficient and effective, without the penalty section, and, in that situation, we cannot pronounce that section separable.

The second distinguishing consideration is that no penalties accrue unless the owner withdraws his liquor, and thus, there is no irreparable injury unless the owner brings it on himself. Ordinarily, a tax becomes due at a fixed date, and thereafter, the penalties against the nonpaying owner accrue in spite of anything he can do. In this case, as we later construe the act, nothing accrues until the owner makes the first move; and, hence, there is superficial force in the consideration urged—but only superficial. It is to say that it is no injury to a property owner to put an intolerable burden upon a certain use by him of his property, because he may, if he will, refrain from that use. This cannot lessen the property-owner's right to complain of the burden, when the effect is upon any rightfully contemplated use of his property; much more must this be true when the effect is upon the only substantial use which he can make of it; and thus we observe another form of the proposition, later discussed, that the withdrawal of whiskey from the warehouse is not a mere privilege.

Plaintiff now desires to ship his whiskey to Massachusetts. He says that he wishes to bottle, to save the heavy "outage" incident to the expected long storage, and that this is not allowed at defendant's

warehouse, but the facilities which he wishes to use are in Massachusetts; to forbid him to make the best rightful use of his property, is, in fact, to deprive him of his property; and it is no answer to say that postponement of the right is his only injury. There is no visible end to the postponement. He can never test the question in any other way than by this case, until he pays the tax and takes the chance of getting it back; every other owner is in the same position; and if each must wait for some other owner to determine the question, the supposed test case can never start. In the meantime, leakage, evaporation, storage charges and regular taxes eat up—or drink up—the property.

We think the injury is correctly to be called irreparable; and it is not only imminent, it is present.

6. *The alleged discrimination against Kentucky holders.*

We do not see that plaintiff is deprived of the equal protection of the laws, merely because those who own and store whiskey in other states may not have to pay this tax or an equivalent one, and, therefore, can take the market away from plaintiff. The Fourteenth Amendment can not insure that each state shall have a taxing system equivalent to that of every other.

Nor are we prepared to say that the statute depends upon a classification, among those who own property in Kentucky, so arbitrary as to be violative of the "equal protection" clause of the Four-

teenth Amendment. We do not understand that to impose an otherwise proper license or excise tax upon a privilege with regard to one class of property has ever been thought unlawfully discriminatory for the sole reason that similar privileges as to other classes of property were not similarly taxed; nor can it be thought that it is merely and wholly arbitrary to put a license privilege as to whiskey in bond in a class by itself.

7. *Is there lack of due process of law?*

This is only another form of stating the ultimate question. If the law is invalid for any of the reasons alleged, it is obvious that to enforce collection of the tax is to take the plaintiff's property without due process; hence, we proceed to the reasons alleged.

8. *Is the entire law invalid because of the excessive penalties?*

The penalties are plainly oppressive—lacking any provision for opportunity to test the law. Giving to plaintiff's property a net value of \$1 per gallon (\$1.50 less the tax), and taking every day's delay to pay the tax as a separate offense, the property would be exhausted by the minimum penalties before it was time to put in an answer to any test suit. This arbitrary character further appears because the fines for willful refusal to pay on 10,000 gallons *cannot* be more than twice as much as they *must* be for the careless neglect to pay on one gallon. We do not see that they are in substance less objectionable than

those denounced in *Ex parte Young*, *supra*, see pp. 145-7; and we have already stated our reasons for thinking that the penalty section was inseparable and that the law would not have been passed without it or some substitute for it. Since it is apparent that there arise questions of law and of fact upon which the owner is entitled to have a judicial inquiry, it would seem that this section makes the whole law invalid; but this point is not expressly made in the bill of complaint, though perhaps included within some general terms therein used, it has not been argued by counsel, and we prefer not to rest our decision upon it, but only to refer to it as confirming us in the conclusion later reached.

9. *Had the Kentucky Legislature power to levy such a tax?*

Taxation is of three kinds: upon persons, upon property and upon excises. This is plainly not a capitation tax. The Kentucky Constitution requires that property taxes shall be levied *pro rata* upon all property, and it is conceded that this particular tax can not be sustained as a property tax. That leaves for consideration only excise taxes.

The Kentucky Constitution gives the Legislature power to "provide for license fees on \* \* \* occupations," and this statute declares that it levies an occupation tax. So far as it is levied upon the occupation of manufacturing whiskey, it is within the ordinary definitions and pursuant to the long-settled policy of Kentucky; but so far as it seeks to mark

out a separate and distinct occupation or business, the owning and storing and withdrawing of untaxed whiskey, it seems to involve a previously unheard of "occupation," and one which, as applied to this subject, is very difficult to distinguish from the occupation of owning property. However, it is unnecessary to rest any conclusion upon a matter of definition. If the statute is a valid exercise of power under any constitutional grant, it ought not to be condemned merely because it adopted a wrong name for itself.

The same clause of the constitution which provides for license taxes for occupations, continues, "or a special or excise tax." There seems no reason to think that the allowable "special" tax was intended to cover a discriminatory property tax or refers to anything which is not fairly to be defined as an excise tax. The ultimate question, therefore, is whether this statute imposes a valid excise tax.

We first meet the problem whether the law intends to impose a tax of fifty cents per gallon per year so long as the business of storing whiskey in bond is continued, or, rather, intends to impose only one fifty cent tax, regardless of the period of storage. In favor of the first view, it is to be noted that the first section expressly declares the tax to be an "annual" one, that, save for changing the definition of the business taxed, the insertion of the word "annual" formed the only change made by the revisers, as compared with Sec. 1 of the Act of 1917, that the Act speaks of "taxes" as though contemplating a plural, and that, although nothing is payable until



withdrawal, it would be possible at that time to compute the tax as having been an annual one accruing year by year up to that date. In favor of the opposite view, it is to be seen that no tax is payable until after a withdrawal or transfer, and that there are express provisions fixing the amount to be paid whenever that time arrives at the sum of fifty cents per gallon.

It may be that these conflicting provisions make the statute so unintelligible that it is invalid for that reason, or it may be that it ought to be construed according to the first view. In either of these events, that would be the end of this controversy, since it is entirely clear, and the Attorney General admits, that an annually accruing tax of this amount would be confiscatory and invalid.

The Attorney General insists that the latter view above specified is the proper one, and says that this is the view which has been and will be taken by the state officers in enforcing the law. Doubtless he can not by his position at this time, bind the Kentucky courts as to their ultimate decision of this question; but, for the further discussion of the matters before us, we assume—without deciding—that he is right and that only one fifty cent tax will ever accrue.

It is no objection to the validity of a tax as an excise that it is payable only upon the happening of an event, or that it is measured by the amount of property which that event affects. This principle is illustrated by *Raydure v. Board*, 183 Ky. 84, sustaining the validity of an excise tax upon the output of oil wells.

The objection to this tax goes deeper. It provides, in effect, that the owner of property situate in Kentucky and who has not embarked that property in any business carried on in Kentucky, may not have his property, for sale or use or to carry into some other state, until he has paid a special tax upon it of a half or a third of its value in addition to all other ordinary and regular taxes. When this law was passed and given immediate effect, there were supposed to be 30,000,000 gallons of whiskey in store in bond in the state. Upon this, the owners had paid the regular *ad valorem* tax every year, and had paid or were liable to pay the regular excise tax of two cents per gallon imposed upon the business of manufacture.

Upon the principle can the mere allowing of this property to remain in existence, in the only form in which the Federal laws allowed it to remain, be considered as a privilege which the legislature might make conditional upon the payment of a tax for revenue—which depends upon different principles than does a regulatory or inspection tax under the police power?

It is true that the quality somewhat changes with age, and it is not inconceivable that a revenue excise tax might rightly be imposed upon the business of storing whiskey for aging purposes, in effect as a branch of the manufacturing business; but it would be distorting this law to attribute to it that purpose.

This tax is imposed, not upon the business of storing, but upon the single business of "owning and storing \* \* \* and in removing"; the tax is the

same whether the storage has been for one day or for a period of years; upon the defendants' construction, which we are now assuming; out of several successive owners of warehouse receipts, who would thus engage in the storing business, all but the last one go free; the thing really taxed is the act of the owner in taking his property out of storage into his own possession (absolute or qualified) for the purpose of making some one of the only uses of which it is capable, *i. e.*, consumption, sale or keeping it for future consumption or sale.

We cannot escape the conviction that it was the real purpose of those who drafted this law to levy a substantial tax upon this great body of property, as property, and that the form of an occupation or excise tax was adopted in order that an object might be accomplished which the Kentucky Constitution forbade. It is a property tax in the clothes of an excise. The whole value of the whiskey depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value. Chief Justice MARSHALL said in *Brown v. Maryland*, 12 Wheat. 419, 444.

"All must perceive that a tax on the sale of an article imported only for sale is a tax on the article itself."

In reaching this conclusion, we must give great weight to the fact that the formerly existing law placed an excise tax of two cents per gallon upon the entire combination business of manufacturing, with its incidental storing and withdrawing. This was the legislature's idea of a proper excise tax. After

the prohibition amendment and laws had practically stopped the business of manufacturing, and, in common supposition, destroyed the great part of the market for whiskey in bond, the legislature repealed the two cent law and substituted this so-called excise tax of fifty cents, which was to be applied to the mere withdrawal, wholly disconnected from manufacture. If the new tax were to be truly an excise, the circumstances suggested a diminution of the old, rather than an increase of 2500 per cent.

Another special consideration tends to persuade to the same end. An excise or occupation tax, ordinarily, is imposed not merely upon a privilege which the legislature may grant or withhold, but upon a privilege which the prospective taxpayer may accept or decline. Not so here. The owners of whiskey in bond in Kentucky, when this law was passed, could not refuse to engage in the business of storing it in Kentucky, if they did not wish to pay the tax. The law was given immediate effect, to the effect that and in order that they could not decline; like the Ancient Mariner's audience, they "can not choose but" stay; and in substance it was declared that they became, on that day, subject to pay a tax on account of the business which they had already done, but which, if it were a business, had been free from this tax until that moment.

The principles which limit the definition of a permissible excise tax are discussed in the familiar text books and digests, and, among many instances, by Chief Justice FULLER, in *Pollock v. Farmers' Co.*, 157 U. S. 429, 580, *et seq.* and by Judge O'REAR, for

the Kentucky Court of Appeals, in *Standard Oil Co. v. Commonwealth*, 119 Ky. 75, 79-81. The controlling proposition is that the mere right to own and hold property cannot be made the subject of excises. The principle has been applied, for example, to the mere owning of timber (*Thompson v. Kreuter*, 112 Miss. 165) and to devoting it to a turpentine orchard, the use for which it was most available (*Thompson v. McLeod*, 112 Miss. 383. See the discussion of principles and authorities in these two Mississippi cases). The Corporation Tax Cases (*Zonne v. Minneapolis*, 220 U. S. 187, 191; *McCoach v. Minnehill*, 228 U. S. 295, 302; *U. S. v. Emery*, 237 U. S. 28, 32) are analogous. Plaintiff's acts, like those of the *Emery* corporation, were "limited to the necessary incidents" of ownership. True, in these cases, the court was trying to find the legislative intent in using the phrase "doing business," and here, we are concerned with the legislative power, but we understand that such power, in this case, rests upon being "engaged in business"; and thus the two questions come to be the same.

We do not necessarily decide the question whether the tax might be good as an excise as applied to whiskey made after the law was passed. Since no license tax is distinctly imposed on manufacturing such whiskey as goes into bond, it might be claimed, with more or less force, that the making, storing and withdrawing was one connected business, the license tax burden being pending until it attached upon the culminating act, the withdrawal. Nothing is now involved except whiskey which had been made and had

gone into storage before March 12; and the business or occupation which justifies the excise must be found in what happened since.

10. *Is the tax confiscatory?*

The mere fact that an excise tax, levied under the revenue power, operates practically to prohibit the business taxed, has been held not to make the law invalid when an act of Congress was under consideration (*McCray v. U. S.*, 195 U. S. 27, 51), but the power of the Kentucky Legislature under the Kentucky Constitution is more limited.

The Attorney General concedes that a tax which operates to prohibit the conduct of an otherwise lawful business is invalid; the plaintiff contends that this invalidity results when the burden, although not completely prohibitive, is so heavy as to take a large part of the profits of the property.

While some of the Kentucky cases invalidate excise taxes because prohibitive, yet they do not necessarily depend for their result, upon the substantially complete prohibition which existed in those particular cases. Other decisions seem to support the plaintiff's contention.

In *Owen County v. Cox*, 132 Ky. 738, it was found that the license tax upon the occupation of operating a four-horse dray was such that the owner "could make little, if anything, more than the amount of the tax." In *Louisville v. Pooley*, 136 Ky. 286, the holding was that a license tax which took respectively from 25 to 100 per cent of the net earnings of those

engaged in a business was so far prohibitive as to be beyond the power of the legislature. In *Sallsbury v. Equitable Co.*, 177 Ky. 348, a license tax which was found to amount to one-third of the net earnings of the largest business of the class was considered unreasonable, confiscatory and prohibitive. A number of similar cases are reviewed, and an injunction against the tax was sustained.

Many excise taxes that, as against other business, would seem arbitrary and oppressive, have been sustained as against the liquor business because of its character, but these cases have generally if not always involved the exercise of the police power; the present case involves only a tax for revenue. It is further to be noted both that the mere owning of whiskey and the withdrawing of it from bond has not been held to be a business obnoxious to any public policy, and also, that the recent constitutional and statutory prohibitions of intoxicating liquors as a beverage have gone far to remove the burden of public reprobation from that owning and dealing which the law still permits.

It is plaintiff's contention that, since whiskey in bond can be dealt in only through warehouse receipts, the plaintiff if engaged in any business, is engaged in the purchase and sale of these certificates (although not in Kentucky) with the prospect of making, at the best, only a few cents per gallon, and that the imposition of this tax destroys all of the profits which the average dealer in certificates can make. We do not see that plaintiff is in any better position than his vendor, mediate or immediate, who was the manufacturer, would have been, and the real ques-

tion is whether one who had manufactured whiskey and who had it on hand in bond when this law was passed, can complain of the tax as confiscatory.

Considerable proof has been taken by both parties as to the value of whiskey in bond, in order to show what fraction of that value has been taken by the tax. In finding the facts upon that subject which rightfully bear upon this motion, we should give the benefit of reasonable doubts to the state, since the unconstitutionality of the act should clearly appear before there can be an injunction; nor can we consider as controlling the peculiar values which special brands may have on account of special reputation, nor treat the plaintiff in this case any better or any worse than the average of his class; because, with such a question, his peculiar hardships will not avail him nor will his special lack of equity sustain the law. Defendant has proved tending to show that some sales to the retailer of tax paid whiskey are being made at a figure which seems to leave two dollars per gallon for the in bond owner, and that, after deducting cost and expenses and this fifty cent tax, there will be a good profit to the manufacturer. We think these instances are rather exceptional and the computation of costs omits important items. The market price, the regular selling price, of warehouse receipts is the true criterion, because in no other way is whiskey in bond bought and sold.

Plaintiff claims this value is not more than one dollar. Defendant claims it to be a dollar and a half.

The facts seem to be that, early in 1920, the general price throughout the country was somewhat less



than one dollar; that the imposition of this Kentucky tax tended to depress the price of that stored in Kentucky and to advance that stored elsewhere; that market conditions at about the time of and since the passage of the act, have also tended to increase the price; and that the present market price of certificates for whiskey in bond, in Kentucky, is about one dollar, and that of certificates for storage elsewhere about one dollar and a half. It is obviously true that if the fifty cent tax were paid by all holders of Kentucky storage, they could not add that amount to their price, because the same act would double the quantity available for the market and depress the price.

We think it can fairly be assumed that within a short period after the act was passed and when it began to take substantial effect, whiskies in bond, in Kentucky, as a class, would have been worth about \$1.25, if it were not for this law, and that the tax, therefore, should be considered as taking about forty per cent of that value, and a very large part, if not all, of the normal profits of the manufacturing and storing business (\*).

We have said that this tax was not discriminatory merely because whiskey outside of Kentucky is not reached; but this situation has a bearing on the question whether the tax is so oppressive as to be prohibitive under the Kentucky rule. When the federal government imposes an excise tax on whiskey, it operates alike upon the manufacturers and owners

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\*On the question of value, it is not irrelevant that a state board, charged with the duty of assessing at the true value for *ad valorem* taxation, values whiskey in bond at fifty cents per gallon.

throughout the country; all can add the tax to their price, and no manufacturer suffers save from the indirect result of a possibly less consumption. It is otherwise, when a forty per cent tax is laid upon the manufacturers of one state only and their market is a national market. If they add the tax to their selling price, they are out of business, so far as competitive standards control.

In view of these facts, and the Kentucky decisions, we believe this tax to be so prohibitive as to be in violation of the Kentucky constitution.

11. Our conclusion that the tax is invalid is subject to review. No action ought to be permitted by either party, which would make that review unavailable. We think the practical way to prevent the injury to plaintiff arising from perhaps a long suspension of his right to take and have his property free from unlawful burden, and yet to preserve the tax to the state if it shall eventually be found valid, is to provide that the injunction which will permit the plaintiff to take his property out of the state without paying the tax shall be conditional upon the giving of a bond by him. The bond will run to the Commonwealth of Kentucky; it will be in the penalty of \$8,000, approximately double the amount of the tax; it will be subject to approval, both as to form and as to sufficiency of surety or sureties, by the clerk of this court, after notice to the Attorney General of the application for approval; it will be filed with the clerk and be retained by him until it shall hereafter be ordered by the court either to be cancelled or to be delivered to the Commonwealth for suit; and it will

be conditioned that the plaintiff pay, or cause to be paid, a tax of fifty cents upon each proof gallon taken, or caused to be removed, under protection of the injunction, without payment of the tax—such payment to be made if and when it shall be finally decided in this cause that the tax is valid and should have been paid, or if and when this cause shall finally fail and be dismissed for any reason.

12. We are informed that other owners of warehouse receipts, situated similarly to plaintiff, desire to, and will, bring similar suits. We think it proper that each such owner should be allowed to intervene in this suit, if plaintiff does not object, or, lacking intervention, that each such suit should be consolidated with this for the general purposes of hearing and tried. It is clear that the right of each intervenor or plaintiff to an injunction will be the same as the right of the plaintiff here, unless by reason of some special circumstance. We think the substance and the spirit of Sec. 266 have been met by the hearing which has now been had upon this subject before the court of three judges convened under that section, and that it is not necessary to have a further hearing before such special court upon each application for injunction made by any such intervenor or other plaintiff. We therefore approve the issue of preliminary injunction by the District Judge to any such intervenor or plaintiff whose case appears to such District Judge not to be essentially distinguishable from that of this plaintiff, such injunction to be upon the same terms and conditions as prescribed herein.

13. What we have said disposes of the motion

for injunction and of the matters urged merely in opposition. The defendant Warehouse Company and the defendants Auditor and Attorney General have filed motions to dismiss. If these were to be granted, they would result in a final decree. We think the court, as now constituted, has no jurisdiction to make a final decree, but is called into existence for the sole purpose of hearing and deciding the motion for a preliminary injunction. Of course, if we have no power to sustain the motions to dismiss, we have no power to deny them. Accordingly, they will stand for hearing before the District Judge in the due course of procedure.

We are aware that upon appeals from orders made under Sec. 266, the Supreme Court has not noticed the distinction between the power to decide the motion for injunction and to make final disposition of the cause, but we know of no express or necessarily implied ruling on the subject. There are some practical reasons for thinking that the court, thus constituted, ought to retain jurisdiction of the whole case until the end; but we cannot find this power in the statute.

A. C. DENISON,  
*Circuit Judge,*

WALTER EVANS,  
J. E. SATER,

*District Judges.*

May 31, 1920.

IN THE DISTRICT COURT FOR THE EAST-  
ERN DISTRICT OF KENTUCKY.

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KENTUCKY DISTILLERIES WAREHOUSE  
COMPANY, - - - - - *Plaintiff,*

*vs.* **Judgment Granting Temporary Injunction.**

CHARLES I. DAWSON, ATTORNEY GEN-  
ERAL, ETC., - - - - - *Defendants.*

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**At a Court held June 17, 1920.**

This case coming on to be heard upon the Plaintiff's motion for a temporary injunction, upon its verified Bill in Equity herein, before the Hon. A. C. Dennison, Circuit Judge, Hon. Walter Evans, District Judge, and Hon. A. M. J. Cochran, District Judge, pursuant to Section 226 of the Judicial Code, and the cause having been argued by Counsel and the Court being advised and memorandum opinion having been rendered and filed herein, it is thereupon ordered, considered and adjudged as follows, to-wit:

(1) That until the further order of the Court, the defendant, John J. Craig, Auditor of Public Accounts of the Commonwealth of Kentucky, desist and refrain from demanding in any manner the report or reports required by the Act of the General Assembly of the Commonwealth of Kentucky of March 12, 1920 (except to the extent that such reports may be made by virtue of the stipulation filed herein) upon the removal from bond or transfer in bond of such whis-

key contemplated by said Act, and from asserting against such whiskey or the property of plaintiff in Kentucky, on account of such removal or transfer, any lien under said act; and the defendants Charles I. Dawson, Attorney General of the Commonwealth of Kentucky, and Victor A. Bradley, Commonwealth's Attorney for the Fourteenth Judicial District of Kentucky, and each of them, desist and refrain from instituting any action or proceeding in Equity or at law, or procuring any indictment or warrant to coerce the payment by the plaintiff of the tax specified in said Act, upon the distilled spirits known as whiskey, stored in the bonded warehouses of the plaintiff, or upon any of the plaintiff's warehouses or property, or to enforce in any manner against the plaintiff, any penalty or fine prescribed in said Act.

(2) That writs of temporary injunction shall issue accordingly.

(3) That the taking effect of this order of injunction and the issuance of such writ of injunction, be upon the condition precedent, that the plaintiff file with the Clerk of this Court, a bond to the Commonwealth of Kentucky, in an amount equal to one and one-fourth ( $1\frac{1}{4}$ ) times the amount of the tax due from the plaintiff, at the time such bond or any additional bond may be given, to be approved as to form and as to sufficiency of the surety or security, by the Clerk of this Court (or in accordance with any stipulation made between the parties hereto), and to be retained by said Clerk until it shall thereafter be ordered by the Court, either to be cancelled or to be

delivered to the Commonwealth for suit, and to be conditioned that the plaintiff pay or cause to be paid, a tax of fifty cents upon each proof gallon of distilled spirits taken or caused to be taken or removed under the protection of the injunction in this case, without payment of the tax, such payment to be made if and when it shall be finally decided in this case that the tax is valid and should have been paid, or if and when this case shall finally fail or be dismissed for any reason.

(4) That during the time that the temporary injunction herein shall continue in force, the plaintiff shall within the first fifteen days of each calendar month hereafter, execute a bond similar to the one originally executed to secure the payment of the tax upon so much distilled spirits as shall have been withdrawn from bond or transfer under bond out of the State, during the preceding calendar month.

This clause of this decree may be superseded by any stipulation agreed between the parties and filed of record in the case.

A. C. DENISON,  
*Circuit Judge.*

WALTER EVANS,  
A. M. J. COCHRAN,  
*District Judges.*

IN THE DISTRICT COURT OF THE UNITED  
STATES FOR THE EASTERN DISTRICT  
OF KENTUCKY.

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KENTUCKY DISTILLERIES WAREHOUSE  
COMPANY, - - - - - Plaintiff,  
  
vs. *Petition for Appeal.*

CHARLES I. DAWSON, ATTORNEY GEN-  
ERAL, ETC., - - - - - Defendants.

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*To the Honorable, the Judge of the District Court of  
the United States, for the Eastern District of  
Kentucky.*

The defendants, Charles I. Dawson, Attorney General of the State of Kentucky, Victor A. Bradley, Commonwealth's Attorney for the Fourteenth Judicial District of the State of Kentucky, and John J. Craig, Auditor of Public Accounts of the State of Kentucky, respectfully represent to the Court that they are, and that each of them is, aggrieved by the decree entered in this case on June 17, 1920, for the reasons set forth in the Assignment of Errors hereto attached.

WHEREFORE plaintiff prays for an appeal to the Supreme Court of the United States to the end that said decree may be reviewed, and if found erroneous, reversed.

CHARLES I. DAWSON,  
*Attorney General of the State of Kentucky,  
Counsel for Defendants.*



IN THE DISTRICT COURT OF THE UNITED  
STATES FOR THE EASTERN DISTRICT  
OF KENTUCKY.

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KENTUCKY DISTILLERIES WAREHOUSE  
COMPANY, - - - - - Plaintiff,  
vs. *Assignment of Errors.*

CHARLES I. DAWSON, ATTORNEY GEN-  
ERAL, ETC., - - - - - Defendants.

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The defendants, Charles I. Dawson, Attorney General, etc., Victor A. Bradley, Commonwealth's Attorney, etc., and John J. Craig, Auditor, etc., file this, their Assignment of Errors, to-wit:

1. The Court erred in granting an interlocutory injunction herein.
2. The Court erred in holding that the Act of the General Assembly of the State of Kentucky, approved March 12, 1920, was unconstitutional, and especially in holding,
  - (a) That the said Act of March 12, 1920, was void because of the excessive penalties imposed for the violation thereof;
  - (b) That the said Act of March 12, 1920, imposed not a license or excise tax, but a property tax;
3. The Court erred in refusing to stay proceedings herein pending the determination of the suit brought in the State Court.

4. The Court erred in holding

- (a) That the plaintiff had no adequate remedy at law; and
- (b) That imminent, irreparable injury was threatened, which justified the issuance of an interlocutory injunction.

5. The Court erred in refusing to sustain the defendant's motion to dismiss the Bill in Equity.

CHAS. I. DAWSON,  
*Attorney General of Kentucky,*  
*Counsel for Defendants.*

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IN THE DISTRICT COURT OF THE UNITED  
STATES FOR THE EASTERN DISTRICT  
OF KENTUCKY.

In Equity, No. 937.

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KENTUCKY DISTILLERIES & WAREHOUSE  
COMPANY,        -        -        -        -        -        *Plaintiff,*  
*vs.*                                **Bond on Appeal.**

CHARLES I. DAWSON, ATTORNEY GEN-  
ERAL, ETC.,        -        -        -        -        -        *Defendants.*

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KNOW ALL MEN BY THESE PRESENTS,  
that we, Charles I. Dawson (Attorney General of the  
State of Kentucky), Victor A. Bradley (Common-  
wealth's Attorney for the Fourteenth Judicial Dis-  
trict of Kentucky) and John J. Craig (Auditor of  
Public Accounts) as principals, and W. T. Fowler as  
surety, are held and firmly bound unto the Kentucky

Distilleries & Warehouse Company in the sum of Five Hundred (\$500) Dollars, lawful money of the United States, to be paid to them and their respective executors, administrators and successors; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors, and administrators, by these presents.

Sealed with our seals and dated this 22d day of June, 1920.

WHEREAS the above-named Charles I. Dawson (Attorney General of the State of Kentucky), Victor A. Bradley (Commonwealth's Attorney for the Fourteenth Judicial District of Kentucky) and John J. Craig (Auditor of Public Accounts) have prosecuted an appeal to the Supreme Court of the United States to reverse the judgment of the district court for the Eastern District of Kentucky, in the above-entitled cause:

Now, therefore, the condition of this obligation is such that if the above-named Charles I. Dawson (Attorney General of the State of Kentucky), Victor A. Bradley (Commonwealth's Attorney for the Fourteenth Judicial District of Kentucky) and John J. Craig (Auditor of Public Accounts) shall prosecute their said appeal to effect and answer all costs if they fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

CHAS. I. DAWSON,  
VICTOR A. BRADLEY,  
JNO. J. CRAIG,  
W. T. FOWLER.

STATE OF KENTUCKY, }  
COUNTY OF FRANKLIN. } ss.

On the 22d day of June, 1920, personally appeared before me Charles I. Dawson (Attorney General of the State of Kentucky), Victor A. Bradley (Commonwealth's Attorney for the Fourteenth Judicial District of Kentucky) and John J. Craig (Auditor of Public Accounts) and W. T. Fowler, respectively, known to me to be the persons described in and who duly executed the foregoing instrument as parties thereto, and respectively acknowledged, each for himself, that they executed the same as their free act and deed for the purposes therein set forth.

And the said Charles I. Dawson (Attorney General of the State of Kentucky) and John J. Craig (Auditor of Public Accounts) and W. T. Fowler being respectively by me duly sworn, says, each for himself and not one for the other, that he is a resident and householder of the said county of Franklin and that he is worth the sum of \$1,000.00 over and above his just debts and legal liability and property exempt from execution.

CHAS. I. DAWSON,  
VICTOR A. BRADLEY,  
JNO. J. CRAIG,  
W. T. FOWLER.

Subscribed and sworn to before me this 22d day of June, 1920.

My commission expires May 20, 1924.

ADDIE BRUMFIELD,  
Notary Public, Franklin County,  
Kentucky.

(Seal)

The within bond is approved both as to sufficiency and form this 23d day of June, 1920.

A. M. J. COCHRAN,  
*Judge District Court U. S. for  
Eastern Dist. of Ky.*

IN THE DISTRICT COURT OF THE UNITED  
STATES FOR THE EASTERN DISTRICT  
OF KENTUCKY.

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KENTUCKY DISTILLERIES WAREHOUSE  
COMPANY, - - - - - *Plaintiff,*  
*vs.* **Order Granting Appeal.**

CHARLES I. DAWSON, ATTORNEY GEN-  
ERAL, ETC., - - - - - *Defendants.*

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**At a Court held on June 23, 1920.**

This day came the defendants by counsel and presented their Assignment of Errors, Appeal Bond, and Petition for Appeal, praying for an appeal to the Supreme Court of the United States, from the decree entered herein June 17, 1920, granting an interlocutory injunction, and it is thereupon ordered that the Appeal Bond be, and the same hereby is approved; that the Assignment of Errors, Appeal Bond and Petition for Appeal be, and the same hereby are filed, and that the appeal to the Supreme Court of the United States be, and the same hereby is granted.

A. M. J. COCHRAN,

June 23, 1920.

*Judge.*

IN THE DISTRICT COURT OF THE UNITED  
STATES FOR THE EASTERN DISTRICT  
OF KENTUCKY.

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KENTUCKY DISTILLERIES WAREHOUSE  
COMPANY, - - - - - Plaintiff,  
vs. **Stipulation.**

CHARLES I. DAWSON, ATTORNEY GEN-  
ERAL, ETC., - - - - - Defendants.

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IT IS STIPULATED between the plaintiff and the defendants, as follows, to-wit:

1. That on the appeal to review the final decree entered June 17, 1920 herein, the following papers and no others shall constitute the entire Transcript of Record on such appeal.

- (a) Bill in Equity.
- (b) Motion for an Interlocutory Injunction.
- (c) Motions to Dismiss.
- (d) Motion for stay of proceedings.
- (e) Transcript of record in State Court suit filed with defendants' motion for a stay of proceedings.
- (f) Order entered June 4, 1920.
- (g) Per curiam opinion filed June 17, 1920.
- (h) Opinion in *J. & A. Freiburg Co. v. Louisville Public Warehouse Co., etc.*
- (i) Decree granting temporary injunction entered June 17, 1920.
- (j) Petition for Appeal.

- (k) Appeal Bond.
- (l) Assignment of Errors.
- (m) This Stipulation.
- (n) Clerk's Certificate.

2. That the issuance and service of citation is hereby waived, and the appearance of the plaintiff is hereby entered in the Supreme Court of the United States.

WM. MARSHALL BULLITT,  
*Counsel for Plaintiff,*  
CHAS. I. DAWSON,  
*Counsel for Defendants.*

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DISTRICT OF KENTUCKY—ss.

I, JOHN W. MENZIES, Clerk of the District Court of the United States for the Eastern District of Kentucky at Frankfort, do hereby certify that the foregoing 94 pages contain a true and correct transcript of all the portions of the record to be copied in the case mentioned in the caption hereof, in accordance with the stipulation of counsel on file and copied therein as the same appears from the record and files in my said office.

WITNESS my hand and seal of said Court this the—— day of July, A. D. 1920.

JOHN W. MENZIES, Clerk,  
By———, D. C.

DEPT. OF JUSTICE  
**TRANSCRIPT OF RECORD.**

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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1920.**

No. **582**

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**CHARLES I. DAWSON**, Attorney General of the Commonwealth of Kentucky, and individually, **LOUISVILLE PUBLIC WAREHOUSE COMPANY** (a corporation); **JOHN J. CRAIG**, Auditor of the State of Kentucky, and individually,  
*Appellants.*

*vs.*

**THE J. & A. FREIBERG COMPANY**, (Incorporated)  
*Appellee.*

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**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE WESTERN DISTRICT OF KENTUCKY.**

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Filed, Oct 11, 1920.

(27939)



# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No.

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CHARLES I. DAWSON, Attorney General of the Commonwealth of Kentucky, and individually, LOUISVILLE PUBLIC WAREHOUSE COMPANY (a corporation); JOHN J. CRAIG, Auditor of the State of Kentucky, and individually,  
*Appellants,*

versus

THE J. & A. FREIBERG COMPANY, (Incorporated)  
*Appellee.*

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

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## INDEX.

	Page
Bill of Complaint.....	2
Motion for Interlocutory Injunction.....	18
Affidavit of Joseph Debar.....	19
Affidavit of Samuel Freedman.....	22
Affidavit of Thomas S. Jones.....	24
Affidavit of Milton Barkhouse.....	26
Affidavit of George R. Landen.....	27
Motion of John J. Craig, Auditor, and Chas. I. Dawson, Attorney General, to dismiss Bill of Complaint.....	29
Affidavit of James Thompson.....	30
Affidavit of John J. Craig.....	31
Affidavit of Elwood Hamilton.....	35
Motion to stay proceedings.....	40
Transcript of Record in case of Rosenbloom vs. E. H. Taylor, Jr. & Sons.....	42
Answer of John J. Craig and Chas. I. Dawson.....	60
Motion of Louisville Public Warehouse Co. to dismiss Bill of Complaint.....	67

	Page
Affidavit of J. P. Meehan.....	67
Affidavit of P. H. Leatherwood.....	70
Affidavit of Wm. Dunn.....	71
Affidavit of W. W. Wickoff.....	72
Affidavit of Harry A. Wiechelman.....	74
Affidavit of Mason Brown.....	76
Affidavit of O. A. Boeckley.....	77
Affidavit of J. P. Tarbeck.....	78
Affidavit of C. M. Fischer.....	79
Affidavit of C. E. McCarthy.....	79
Affidavit of Robert A. Gordon.....	82
Order filing motion for injunction, motion to dismiss Bill, affidavits, and submitting motions.....	82
Testimony taken before Special Master.....	85
Affidavit of T. K. Helm.....	124
Opinion . . . . .	126
Order granting preliminary injunction.....	153
Petition for Appeal.....	156
Assignment of Errors.....	156
Order granting appeal.....	158
Bond . . . . .	158
Stipulation as to Record.....	160
Waiver of Citation.....	161
Clerk's Certificate . . . . .	161

## TRANSCRIPT OF RECORD.

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THE J. & A. FREIBERG COMPANY  
(Incorporated), - - - - - Plaintiff,

versus

LOUISVILLE PUBLIC WAREHOUSE  
COMPANY (a corporation);

JOHN J. CRAIG, Auditor of the State of  
Kentucky, and individually;

CHARLES I. DAWSON, Attorney General  
of the Commonwealth of Kentucky, and  
individually, - - - - - Defendants.

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Proceedings of the District Court of the United States  
for the Western District of Kentucky, at a regular  
term thereof begun and held at the Federal Court  
Hall in the City of Louisville, on March 8, 1920.

PRESENT: HON. A. C. DENISON, Judge of the United States  
Circuit Court of Appeals for the Sixth  
Circuit;

HON. WALTER EVANS, Judge of the United  
States District Court for the Western Dis-  
trict of Kentucky;

HON. J. E. SATER, Judge of the United States  
District Court for the Southern District of  
Ohio,

sitting in pursuance with the requirements of  
Section 266 of the Judicial Code to hear and  
determine the above mentioned cause.

BE IT REMEMBERED that heretofore, to-wit: on  
the 29th day of April, 1920, came the plaintiff and filed  
in the Clerk's office of the said Court its Bill of Com-  
plaint, which is in words and figures as follows, to-wit:

IN THE DISTRICT COURT OF THE UNITED  
STATES FOR THE WESTERN DISTRICT OF  
KENTUCKY, IN EQUITY No. 77.

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THE J. & A. FREIBERG COMPANY  
(Incorporated), - - - - - *Plaintiff,*

versus

LOUISVILLE PUBLIC WAREHOUSE  
COMPANY (a corporation);  
JOHN J. CRAIG, Auditor of the State of  
Kentucky, and individually;  
CHARLES I. DAWSON, Attorney General  
of the Commonwealth of Kentucky, and  
individually, - - - - - *Defendants.*

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**Bill of Complaint.**

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(1) The plaintiff, The J. & A. Freiberg Company, avers that it is, and at all the times herein mentioned was, a corporation, created and organized under and pursuant to the laws of the State of Ohio, and not by or pursuant to the laws of the State of Kentucky, and is a corporation and citizen of the State of Ohio, and not of the State of Kentucky; and that the defendants, and each and every one of them are citizens of the State of Kentucky and inhabitants of the respective districts of Kentucky as residents of the State of Kentucky, as follows:

The defendant, Louisville Public Warehouse Company, is a corporation, created and organized under the laws of the State of Kentucky, having its chief place of business in Jefferson County, Kentucky, and has power

to sue and be sued, and is now and has been for more than twenty years engaged in a general warehouse business, and has been for more than twenty years and is now established by the Commissioner of Internal Revenue, under the Statutes of the United States, as a general bonded warehouse of the United States for the storage of distilled spirits, and has complied with the laws and regulations of the United States Government pertaining thereto, and is a resident of and domiciled in the Western District of Kentucky.

The defendant, John J. Craig, is the duly elected, qualified and acting Auditor of Public Accounts of Kentucky, and is a resident and inhabitant of Kentucky and of the Eastern District thereof.

The defendant, Charles I. Dawson, is the duly elected, qualified and acting Attorney General of the Commonwealth of Kentucky, and is a citizen and inhabitant of the Eastern District of Kentucky.

And the said defendants, John J. Craig and Charles I. Dawson, now reside temporarily in the City of Frankfort in Franklin County, Kentucky.

And the matter or amount in dispute in this suit exceeds the sum or value of \$3,000, exclusive of interest and costs.

(2) That the plaintiff was formerly engaged in the business of wholesale liquor dealer, with its place of business at Cincinnati, Ohio, where it was qualified, under State and Federal laws, to engage in that business, but has not been for many months, and since January 1, 1920, and is not now, engaged in that business.

That while engaged in the business of wholesale liquor dealer plaintiff purchased distilled spirits known as whiskey in bond, by virtue of the purchase of negotiable warehouse receipts therefor, and either sold such ware-

house receipts to others or tax paid the whiskey covered thereby and merchandised in said whisky. That when plaintiff ceased to carry on the business of wholesale liquor dealer and closed said business it was still the owner of certain distilled spirits known as whisky situated in Government bonded warehouses, plaintiff owning negotiable warehouse receipts therefor, and that certain of said whisky was on deposit in a distillery bonded warehouse in the State of Kentucky, and is the subject of this suit, as more particularly hereinafter set forth.

(3) Plaintiff states more particularly that more than three years ago, to-wit: in October, 1916, plaintiff purchased from T. E. O'Keefe, Proprietor of the Imperial Distillery, Incorporated, Distillery No. 8, Second District of Kentucky, located at Stanley, Kentucky, certain distilled spirits, receiving the negotiable warehouse receipts of said Imperial Distillery, Incorporated, therefor, as follows: 204 barrels, bearing the brand Imperial Distillery, and serially numbered as follows: 64524, 64827 to 64989, and 66440 to 66479, all inclusive; that said barrels contained on original gauge in all 9707.99 wine gallons and 9804.62 proof gallons; and that the barrels were of the production of said Imperial Distillery of April and May in the year 1916, and are now of four years of age and available for commercial sale as matured whisky for medicinal purposes; and plaintiff states that there are now contained in the barrels in excess of 8,000 proof gallons of distilled spirits known as whisky.

The plaintiff continued to own the warehouse receipts for said barrels and that said barrels continued in the distillery bonded warehouse of the producing distillery until the end of the year 1919, when plaintiff, as owner thereof, was requested by the distiller to have the same removed from the distillery bonded warehouse because

it was the desire and purpose of said distiller to have all bonded distilled spirits in said warehouse removed in order that said distillery and warehouse could be closed and all Government bonds thereon canceled. That plaintiff thereupon directed that said distilled spirits be removed in bond by said distiller to the General Bonded Warehouse No. 1, Fifth District of Kentucky, operated by the Louisville Public Warehouse Company, a defendant herein. That plaintiff's barrels above described were so removed and arrived at said General Bonded Warehouse No. 1 and were received by said Louisville Public Warehouse Company, owner thereof, a defendant herein, on the first and second days of January, 1920, and have since the latter date been in deposit and on storage therein in full compliance with the laws of the United States and of all valid laws of the Commonwealth of Kentucky; and that the plaintiff is now the owner thereof, and the defendant, Louisville Public Warehouse Company, is a bonded warehouseman and bailee for hire in possession thereof for plaintiff, subject to the laws of the United States controlling general bonded warehousemen and their possession of distilled spirits in bond, subject to Federal taxes on such distilled spirits. The plaintiff is informed that said Louisville Public Warehouse Company, as general bonded warehouseman, holds all necessary power of attorney from the original distiller to the use of plaintiff, as owner of the described distilled spirits, for further removal in bond to another general bonded warehouse of the United States, in full compliance thereto with the laws of the United States, so as to be able, in full compliance with all laws of the United States, to ship plaintiff's described distilled spirits in bond to another general bonded warehouse in the United States. The plaintiff upon the removal in bond of the described dis-

tilled spirits from the distillery bonded warehouse surrendered its negotiable distillery bonded warehouse receipts and had delivered to it by the Louisville Public Warehouse Company the negotiable warehouse receipts of the defendant, Louisville Public Warehouse Company, for the described distilled spirits, and now holds the same as property of the plaintiff.

(4) That on, to-wit: the 22nd day of April, 1920, plaintiff directed the defendant, Louisville Public Warehouse Company, to remove said barrels of distilled spirits from its general bonded warehouse and ship the same in bond to General Bonded Warehouse No. 2, situated at Boston, Massachusetts, Quincy Market & Cold Storage Warehouse Company, proprietor, such removal and shipment in bond being authorized by the Statutes of the United States, the plaintiff making tender of all charges for storage, ad valorem taxes due the State of Kentucky, and other proper payments by plaintiff to the Louisville Public Warehouse Company on account of the storage of said distilled spirits in said Company's warehouse at Louisville, Kentucky. And plaintiff avers and shows that the defendant, Louisville Public Warehouse Company, refused and continues to refuse to make such withdrawal and shipment, unless the plaintiff pay to said Louisville Public Warehouse Company a sum equal to fifty cents per proof gallon upon each proof gallon of distilled spirits known as whisky contained in the aforesaid barrels, and plaintiff is advised and informed by the defendant, Louisville Public Warehouse Company, that the reasons for its refusal are as follows:

That on, to-wit, the 12th day of March, 1920, an Act of the General Assembly of the Commonwealth of Kentucky was approved, as follows:



*"AN ACT imposing an annual license tax upon every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits known as whisky or brandy or other species of double stamp spirits in this state, and upon every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in this state, and in removing same therefrom for the purpose of sale, or for any other purpose; providing for monthly reports by distilleries and bonded warehousemen, for the purpose of ascertaining the amount of tax due; providing for monthly payments of the amount of license tax due; fixing a penalty for failure to make such monthly report and settlement; providing for the manner of distribution of the taxes so collected; repealing all other license, franchise and excise taxes on the businesses covered by this Act; and declaring an emergency to exist.*

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"1. Every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits, known as whisky or brandy or other species of double stamp spirits, in this state; and every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in this state, and in removing same therefrom for the purpose of sale, or for any other purpose, shall pay an annual license tax to the Commonwealth of Kentucky of fifty cents on every proof gallon of said distilled spirits so manufactured or stored in a bonded warehouse, or withdrawn from a bonded warehouse, or transferred therefrom under bond out of the Commonwealth of Kentucky.

"2. Every corporation, association, partnership and individual owning, controlling or operating a bonded warehouse in this state, wherein distilled spirits known as whisky or brandy or other species of double stamp spirits are stored, shall, on or before the first day of June, 1920, on blanks furnished by the Auditor of Public Accounts, report to the Auditor of Public Accounts the total amount of such

spirits stored in a bonded warehouse owned, controlled or operated by such corporation, association, partnership or individual; and shall make monthly reports to the Auditor of Public Accounts thereafter, which reports must be signed and sworn to by such person, or, in case of a corporation, association or partnership, by some officer or person authorized to make such oath. The first report provided for herein shall show the number of proof gallons of such spirits withdrawn from said warehouse from the date this Act becomes effective to the date of making such report; and each monthly report thereafter shall show the number of proof gallons placed in said bonded warehouse since the date of making the last preceding report, the number of proof gallons withdrawn or transferred since the date of making the last preceding monthly report, and the aggregate number of gallons on hand at the date such report is made. In all cases where such spirits are transferred under bond from one bonded warehouse in this Commonwealth to another, said report shall show the warehouse from which same has been transferred and the warehouse to which same has been transferred, the quantity thereof and the serial number of each of the packages so transferred.

"3. Every person, corporation, association or partnership operating, owning or controlling such bonded warehouses, shall, at the time said reports herein provided for are made, pay to the Auditor of Public Accounts the tax of fifty cents per proof gallon upon each proof gallon of such spirits removed from the bonded warehouse owned, controlled or operated by such person, corporation, association or partnership, or transferred under bond out of this state, up to the date of making such report; and for the purpose of securing the payment of the license taxes herein provided for, the Commonwealth shall have a lien on all such spirits stored in such bonded warehouses, together with the other property of the bonded warehousemen used in connection therewith; and in all cases where the spirits so removed or transferred were owned or controlled by another than the bonded warehousemen, then the bonded warehouseman shall collect and pay the tax due on such spirits so removed or transferred under bond,

and shall be subrogated to the lien of the Commonwealth.

"4. Every corporation, association, partnership and individual engaged in distilling spirits known as whisky or brandy or other species of double stamp spirits in this state, shall pay the license tax herein provided upon all such spirits so manufactured and removed from the premises without being placed in a bonded warehouse at the date of the removal of such spirits; and all such corporations, associations, partnerships and individuals engaged in the business of distilling such spirits in this state shall file monthly statements with the Auditor of Public Accounts, on blanks to be furnished by the Auditor, which statements must be sworn to and which statements shall show the number of proof gallons of such spirits so distilled and removed from the premises without having been stored in a bonded warehouse, and at the time of filing such statements shall pay to the Auditor of Public Accounts the amount due on such spirits so manufactured and removed; and for the payment of the taxes due under this provision, the Commonwealth shall have a lien upon all the machinery and the premises and the manufactured spirits made thereon, of the corporation, association, partnership or individual engaged in such distilling business.

"5. Every person, corporation, association or partnership failing to make the reports herein provided for, in the manner herein provided for, and failing to pay the taxes as they become due, as herein provided for, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than five hundred dollars nor more than one thousand dollars, and each day after the date such report is due that such person, corporation, association or partnership is in default shall be treated and considered as a separate offense.

"6. The tax herein provided for, when collected, shall be distributed as follows: To the State Road Fund, sixty-five per cent thereof; to the General Expenditure Fund, thirty-five per cent thereof.

"7. The license tax herein imposed shall be in lieu of all other license, franchise or excise taxes now imposed by law on persons, corporations, partnerships or associations engaged in business covered

by this Act; and all Acts in conflict therewith are hereby repealed, and especially there is hereby repealed Chapter 5 of the Acts of the Special 1917 Session of the General Assembly of Kentucky.

"8. Whereas, many persons, corporations, associations and partnerships are now engaged in the business covered and licensed by this Act, without paying an adequate license tax to the Commonwealth of Kentucky therefor; and whereas, the liquor which they are handling and in which they are dealing is constantly in large quantities being removed from the bonded warehouses and disposed of, without the state securing an adequate license tax thereon, an emergency is hereby declared to exist, and this Act shall take effect from and after the date of its passage and approval by the Governor."

The defendant, Louisville Public Warehouse Company, asserts that the tax of fifty cents per proof gallon must be paid by it as a warehouseman, and that in the event it, as warehouseman, removes, delivers or ships, in bond, to another general bonded warehouse, the aforesaid distilled spirits, without having collected the said tax of fifty cents per proof gallon, it will be obligated to pay to the Auditor of Public Accounts for the Commonwealth of Kentucky, a defendant herein, the total amount of tax on plaintiff's distilled spirits, and by losing possession of the distilled spirits will lose its statutory subrogated lien thereon, and failing such payment to the said Auditor of Public Accounts, the latter, for the State, will assert a lien upon the property of the said defendant used in connection with such storage, and that thereby a cloud will be cast upon its title to its said real-estate and other property; and it fears that it will be subjected, for failure to report or to pay, as provided in the fifth section of said Act, to large and numerous fines and penalties and to criminal prosecutions.

(5) The defendant, John J. Craig, as Auditor of Public Accounts for the Commonwealth of Kentucky, is charged with the duty, in the Act last quoted, of receiving the payment of fifty cents per proof gallon upon each proof gallon of whisky removed from bonded warehouses, as provided in section three thereof; and to receive the reports from the warehousemen, provided for in section two of said Act; and the plaintiff is advised and informed that the defendant, John J. Craig, as Auditor of Public Accounts, proposes, unless enjoined, to enforce all liens, penalties and fines in case of failure to make the reports and to pay the taxes attempted to be provided for by said Act. And plaintiff is further informed that in such threatened and proposed enforcement the defendant, John J. Craig, will report all cases of alleged failure to make reports and pay taxes to the defendant, Charles I. Dawson, as Attorney General of the Commonwealth of Kentucky.

(6) Plaintiff is advised and informed that the defendant, Charles I. Dawson, as Attorney General of the Commonwealth of Kentucky, is the chief law officer of the Commonwealth of Kentucky and of all of its departments, and as such threatens and proposes, unless enjoined, in the enforcement of said Act, to bring suits and prosecutions to enforce liens, collect the taxes attempted to be assessed, and to enforce all penalties and fines attempted to be provided in cases of violation of the terms of said Act.

(7) The plaintiff avers that it is not now engaged in any occupation or business in the Commonwealth of Kentucky, in or about or in connection with the aforesaid described whisky, but that the aforesaid whisky was purchased by it in bond and removed to the General Bonded

Warehouse No. 1 conducted by the defendant, Louisville Public Warehouse Company, and is now in said General Bonded Warehouse No. 1 in storage, as alleged, and except for these facts plaintiff is in no way engaged in business in the State of Kentucky in the premises set forth. That the plaintiff does not propose to do any business or make any sales of its whisky in Kentucky, but desires only to remove the same in bond to the State of Massachusetts, and when commercially feasible to sell the same by sale of its warehouse receipts therefor as authorized and permitted by the laws of the United States.

(8) Plaintiff shows that distilled spirits in bond are subject to loss by leakage and evaporation, and that in long continued storage large losses occur due to these causes; that under the Internal Revenue Laws of the United States distilled spirits can not be bottled in bond in a general bonded warehouse; and that, therefore, plaintiff, in case it is long delayed in disposing of its title to its distilled spirits above described, cannot have the same bottled in bond to avoid further loss by leakage and evaporation, and only by withdrawal from general bonded warehouse and bottling, after tax payment, can such saving be availed of; and that plaintiff, not having any prospective purchaser for said distilled spirits and facing a long continued ownership thereof, is confronted with great and irremediable loss through its inability to have its distilled spirits removed as desired, or, if necessary to their preservation by bottling, to tax pay and withdraw same for bottling, after tax payment, except upon the payment of the illegal assessment of fifty cents per proof gallon as attempted to be made the condition of removal for any purpose by the Act aforesaid and by the conduct of the defendants herein based upon the color of said Act.

And plaintiff further avers on information from official sources and on its own belief that there is now in bonded warehouses elsewhere than in the State of Kentucky and within the United States distilled spirits known as whiskey to an amount exceeding 50% of such spirits in bond in the United States; and upon information from official sources and on its own belief plaintiff avers that such spirits in bond are sufficient to supply all demand of the trade for which such spirits are salable for a period of many years exceeding five years; and on information and belief plaintiff avers that one large distillery in the United States and outside of the State of Kentucky is now operating manufacturing distilled spirits known as whisky, and that several other large distilleries located outside of the State of Kentucky and in the United States have declared their intention of and are now preparing to engage in the manufacture of distilled spirits known as whisky; and such new production of distilled spirits known as whisky will supply the demand therefor at a price far below the cost and carrying charges of this plaintiff upon its whisky if the plaintiff's whisky is subjected to the tax of fifty cents per proof gallon now claimed by the defendants herein in behalf of the Commonwealth of Kentucky. And plaintiff further avers that the price or value in bond of whisky of the character herein suit is approximately one dollar per proof gallon, such prices varying, according to information and belief, from seventy cents to one dollar per proof gallon; and the plaintiff is in direct competition with others engaged in a similar business in the sale of such distilled spirits known as whisky at said prices. That there are large quantities of distilled spirits known as whisky of Kentucky production in bond outside of the State of Kentucky with which distilled spirits plaintiff's above described

whisky must come in competition for ultimate sale. And plaintiff further avers that for the defendants, or the Commonwealth of Kentucky, to levy or collect, in the form of a license tax of otherwise, a tax at the rate of fifty cents per proof gallon per annum, or even for one year, upon plaintiff's above described distilled spirits known as whisky, would be to destroy and confiscate the plaintiff's property and deprive the plaintiff of its property.

(9) Plaintiff avers that the assessment or collection by any process or means of the aforesaid so-called and described license tax of fifty cents per proof gallon upon its aforesaid distilled spirits known as whisky would be to take plaintiff's property and to deprive plaintiff of its property without due process of law, and to deny to the plaintiff the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States.

And plaintiff further avers that said license tax upon its distilled spirits and the alleged lien created upon its property violates the thirteenth and fourteenth sections of the Bill of Rights of the Constitution of the State of Kentucky; and that as a license tax, if such proposed tax be, in fact, a license tax upon any occupation which plaintiff can be said to be engaged in, is so enormous and confiscatory upon the alleged business or occupation of owning whisky in bond, which the plaintiff avers is not a business, that it is prohibitive of a useful and legitimate occupation and destructive thereof and invalid under the Constitution of the State of Kentucky; and plaintiff further avers that said tax and the Act attempting to create said tax, are in violation of the taxing provisions of the Constitution of the State of Kentucky and void.



Plaintiff avers that the unauthorized and illegal attempted tax aforesaid by creating a statutory lien in behalf of the Commonwealth, and by the attempted subrogation of the defendant warehouseman to such lien, creates a cloud upon the property of the plaintiff, and unless restrained and enjoined, as hereinafter prayed, the defendants, officers of the Commonwealth, and the defendant, Louisville Public Warehouse Company, will engage in a multiplicity of suits involving plaintiff's property for the penalties continually accruing and to accrue for a violation of the Act, aforesaid, and plaintiff and plaintiff's property will be subjected to a multiplicity of suits, liens and liabilities, against which plaintiff will have no adequate remedy at law, or any remedy at law, for the protection of plaintiff's rights or the preservation and enjoyment of its property aforesaid, but would be subjected to great and irreparable injury unless this Court will interfere by injunctive process to restrain the enforcement and collection of said claims, taxes and penalties.

WHEREFORE and for as much as the plaintiff is remediless in the premises according to the common law and remediable only in equity, and to the end that plaintiff may not be subjected to a multiplicity of suits which would otherwise result, and may not suffer irreparable injury and damage, and may be permitted to pursue and carry on its business without hindrance or obstruction, and a cloud upon the title to its property may be removed, the plaintiff prays:

(1) That a writ of subpoena issue against the defendants and each and every one of them named and described, as aforesaid, to appear and full and true answers make to this Bill of Complaint, but not under oath, answer under oath being hereby waived; and

(2) That the defendant, Louisville Public Warehouse Company, be enjoined from further refusing, upon the plaintiff's paying all other charges, taxes and claims accrued against the plaintiff's above described whisky, excepting only the tax of fifty cents per proof gallon endeavored to be assessed and collected by the aforesaid Act, to ship and transport the same in bond to a general bonded warehouse in Boston, Massachusetts, or elsewhere, when and as the plaintiff may direct; and that the defendant, Louisville Public Warehouse Company, be enjoined from asserting any lien for said tax of fifty cents per proof gallon upon plaintiff's described whisky by subrogation or otherwise under color of the Act aforesaid; and

(3) That the defendants, John J. Craig and Charles I. Dawson, be enjoined and restrained from demanding in any manner, by suit or otherwise, the making of a report upon plaintiff's described whisky, or as to its removal under the Act aforesaid, and from endeavoring, by suit or otherwise, to collect the said tax, or any part thereof, upon plaintiff's described distilled spirits, and from asserting, or attempting to enforce, any lien thereon for the said tax under the Act aforesaid; and

(4) That the defendant, Charles I. Dawson, be enjoined and restrained from instituting any action or procuring any indictment, warrant, or otherwise proceeding in equity or at law, to coerce the payment by plaintiff of any tax under the aforesaid law assuming to levy an annual tax at the rate of fifty cents per proof gallon per annum, or otherwise, under color of said Act, on said whiskey of the plaintiff, or the penalties or fines prescribed in the Act aforesaid; and

(5) That meanwhile a temporary restraining order issue in accordance with this prayer for a preliminary

injunction; and for all other and further general and equitable relief to which the plaintiff may be entitled, including its costs herein incurred; which to this Court may in equity seem meet and right.

THE J. & A. FREIBERG COMPANY,

By J. ARTHUR FREIBERG,

*Secretary.*

LEVI COOKE,

TRABUE, DOOLAN, HELM & HELM,

*Counsel for Plaintiff.*

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UNITED STATES OF AMERICA,  
COUNTY OF HAMILTON,  
STATE OF OHIO.

On this 24th day of April, 1920, before me personally appeared in the above County and State J. ARTHUR FREIBERG, who made solemn oath that he is the Secretary and executive officer of THE J. & A. FREIBERG COMPANY, the above named plaintiff, and that he read the foregoing Bill of Complaint and subscribed the same in my presence, and that he knows the contents thereof and that the same is true to his own knowledge, except as to the matters therein stated on information and belief, and as to these matters he believes them to be true.

My commission expires on the 16th day of November, 1921.

A. J. FREIBERG,

Notary Public, Hamilton County, Ohio.

(SEAL)

**Motion for Interlocutory Injunction—Filed**  
April 29, 1920.

Now comes the plaintiff, The J. & A. Freiberg Company, and moves the Court for an interlocutory injunction, in accordance with the prayer of the petition, and shows that the granting of said motion would involve the restraining of the acts of the officers of the State of Kentucky acting under color of a law of the State of Kentucky; and requests that the Court, in compliance with Section 266 of the Judicial Code, request the assistance of two qualified Judges, in hearing and determining this application; and the plaintiff will give more than five days notice to the defendants and to the Governor and Attorney General of the Commonwealth of Kentucky that such motion will be called up for hearing in this Court at 10 o'clock of the morning of Friday, the 7th day of May, 1920, or as soon thereafter as the Court may direct for the hearing of this motion.

LEVI COOKE,

TRABUE, DOOLAN, HELM & HELM,

*Attorneys for Plaintiff.*

**Affidavit of Joseph Debar**—Filed April 29, 1920.

UNITED STATES OF AMERICA, }  
STATE OF OHIO, } SS.  
COUNTY OF HAMILTON. }

The affiant, JOSEPH DEBAR, being first duly sworn, on oath states:

I am a resident and citizen of the City of Cincinnati, State of Ohio, and for the 45 years preceding April 1st, 1918, was engaged in the business of buying and selling distilled spirits known as whiskey. At the present time I am, and have been for the four years last past, President of the National Association of Distillers and Wholesale Dealers. For the six years preceding such period of four years, I was Secretary of the same organization. During the period in which I was engaged in the wholesale liquor business and during such time as I have occupied an official position with the National Association of Distillers and Wholesale Dealers, I have been familiar with the market prices obtainable for distilled spirits known as whiskey in the various markets throughout the United States. I have also kept informed upon the amount of such whiskey stored in distillery and general bonded warehouses throughout the United States and also as to the amount located in the various States respectively.

At the present time there are stored in the United States in distillery and general bonded warehouses and evidenced by warehouse receipts covering same, approximately 50,000,000 gallons of distilled spirits known as whiskey. This is approximately the amount of actual gallons now stored in the United States, although the warehouse receipts evidencing same call for an amount

of approximately 20 per cent in excess of 50,000,000 gallons, by reason of the fact that such warehouse receipts are based upon and issued for the amount of whiskey originally placed in bond. Such original amount is subject to evaporation and shrinkage during all of the period in which it remains in bonded warehouses in the original barrels.

I am familiar with the quality and price obtainable for distilled spirits known as Bourbon whiskey stored in the various distillery and general bonded warehouses in the State of Kentucky. I am also familiar with the price obtainable for similar distilled spirits known as Bourbon whiskey stored in distillery and general bonded warehouses in the various States outside of the State of Kentucky.

The price obtainable for these distilled spirits known as whiskey, whether manufactured and stored in the State of Kentucky or the States other than Kentucky, prior to the passage of the so-called Vance Act by the legislature of the State of Kentucky, did not vary materially. The quality of these goods is practically the same, whether manufactured and stored in the State of Kentucky or manufactured and stored in States other than Kentucky.

At the present time in marketing distilled spirits, known as whiskey, if stored in the State of Kentucky, it is necessary to accept a price approximately 50 cents per actual gallon less than that obtainable for similar goods stored in States other than Kentucky. No other State has a tax equal to or similar to the 50 cents per gallon tax imposed by the so-called Vance Act upon goods stored in the State of Kentucky.

At the present time approximately one-half of the distilled spirits known as whiskey stored in the United States is stored in distillery and general bonded ware-

houses in the State of Kentucky. The remainder of such distilled spirits known as whiskey is stored in the various States other than Kentucky.

The amount of such distilled spirits known as whiskey stored in States other than Kentucky is sufficient to supply the demand of the consumers in the United States. for a period in excess of five years.

At the present time the well known Large Distilling Company, located near Pittsburgh, Pa., is manufacturing and storing in their distillery bonded warehouse, distilled spirits known as whiskey, the same being similar in character to the distilled spirits known as whiskey now stored in the State of Kentucky.

Other distillers are in a position to and have declared their intention to also manufacture, should the demand justify the same, such distilled spirits known as whiskey. Such distilled spirits known as whiskey can now be manufactured for approximately 40 to 50 cents per gallon and being stored in steam heated warehouses, can be sold at the end of four years, at which time such goods are suitable for medicinal use at a price not to exceed 70 cents per gallon.

Such information as I am able to obtain would indicate that prior to the time at which the distilled spirits known as whiskey now stored in distillery and general bonded warehouses outside of the State of Kentucky is consumed, that an amount sufficient to supply the future demand for the same throughout the United States, can be and will have been manufactured in distilleries located in States other than Kentucky.

And further affiant saith not.

JOSEPH DEBAR.

**Affidavit of Samuel Freedman**—Filed April 29, 1920.

UNITED STATES OF AMERICA, }  
STATE OF OHIO, } SS:  
COUNTY OF HAMILTON. }

The affiant, SAMUEL FREEDMAN, being first duly sworn, on oath states:

I, SAMUEL FREEDMAN, a resident and citizen of the city of Cincinnati, State of Ohio, have been engaged for the past twenty years in the business of buying and selling for my own account, and the account of others, distilled spirits known as whiskey.

At the present time I am a member of the firm of Freedman and Richard engaged in the whiskey brokerage business, with headquarters in the city of Cincinnati, but buying and selling distilled spirits known as whiskey throughout the United States; said distilled spirits known as whisky, being stored in distillery bonded warehouses, and general bonded warehouses located in various States of the United States.

I have been, during the period above mentioned, and am now familiar with market conditions effecting the sale and prices obtained therefor of distilled liquor known as Bourbon whiskey, similar to the distilled liquor manufactured in the year nineteen sixteen (1916) at the Imperial Distillery, known as distillery number eight (No. 8) located in the second district of Kentucky at Stanley, Kentucky.

These liquors do not vary in quality to any appreciable extent from the distilled spirits known as Bourbon Whiskey manufactured at other distilleries located in various States outside of the State of Kentucky, and in marketing such distilled spirits it has always been neces-



sary to compete with the similar distilled spirits manufactured in other States.

The prices obtained have and do vary by reason of various factors aside from the quality of the distilled spirits such as accessibility, cost of transportation, taxes assessed against the same, cost of bottling, etc.

In marketing such distilled spirits it has been necessary to sell the same at a price which when the goods reaches the purchaser it will not exceed to him the cost of similar distilled spirits manufactured in other States.

Prior to the passage of the so called Vance Act by the Legislature of the State of Kentucky, distilled spirits known as Bourbon Whiskey stored in distillery bonded warehouses and general bonded warehouses in the State of Kentucky commanded a price substantially equivalent to the prices obtained for similar distilled spirits known as Bourbon whiskey manufactured in other States outside of Kentucky.

Since the passage of the so-called Vance Act by the Legislature of the State of Kentucky, the demand for distilled spirits known as Bourbon whiskey stored in the State of Kentucky, has been exceedingly light in comparison with the large demand for similar distilled spirits stored in other States, and it has been necessary in order to sell such distilled spirits now stored in the State of Kentucky to quote the selling price of the same at approximately fifty cents (50c) per gallon less than can be obtained for similar distilled spirits now stored in the various states other than Kentucky.

I am familiar with the prices now prevailing upon distilled spirits known as Bourbon whiskey in various markets throughout the United States, and from my own knowledge and from the best information obtainable, such distilled spirits known as Bourbon whiskey, if stored in

a State other than Kentucky, can be sold at a price of approximately a dollar fifty cents (\$1.50) to a dollar seventy-five cents (\$1.75) per gallon in bond.

The average price obtainable for such distilled spirits known as Bourbon whiskey, if stored in the State of Kentucky is approximately one dollar (\$1.00) per gallon to dollar twenty five cents (\$1.25) per gallon. And further affiant saith not.

(Signed) SAM FREEDMAN.

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**Affidavit of Thomas S. Jones**—Filed April 29, 1920.

The affiant, THOMAS S. JONES, being first duly sworn, on oath states:

I am a resident and citizen of Louisville, Kentucky, and have been for the past forty years engaged in the business of distilling distilled spirits known as whisky, and for the past twenty years have been engaged actively in the whisky brokerage business. I am familiar with the current market price, especially of Kentucky Bourbon whisky, and with the markets therefor. Such whisky has a large market throughout the whole country and such whisky or whisky of similar character was heretofore produced and is stored in the States of Ohio, Indiana and Illinois and much of such whisky has been heretofore produced and is stored in the States of Ohio, Indiana and Illinois and much of such whisky has been moved in bond, or tax paid, to Eastern States for sale. Such Bourbon whisky habitually comes into competition with Rye whisky manufactured largely in Pennsylvania, Maryland and other Eastern States, which Rye whisky sells practically uniformly at a higher price per proof gallon than does Bourbon whisky, and Bour-

bon whiskies wherever located either within or without Kentucky are in direct competition with each other, based only on such differences in local taxes or transportation charges to the points of demand, which differences are necessarily absorbed by or lost to the seller thereof.

On information and belief I state that there are now located beyond the borders of Kentucky within the borders of the United States distilled spirits, known as whisky, both Rye and Bourbon, to an amount which would satisfy the limited demand under present regulations for such whiskies for several years to come. That the fair and reasonable sale price of distilled spirits known as whisky, and of the Bourbon character thereof, whether such whiskies be stored in Kentucky or in other States of the Union than Kentucky, is in bond approximately from One Dollar to One Dollar and a Quarter per proof gallon, and if the distilled spirits known as whisky in Kentucky in bond are subjected in addition to other taxes to a license tax of fifty cents per proof gallon, such tax would be absorbed by and lost to the owner before he could sell to pharmacists, druggists and other permitted vendors for medicinal use, in competition with similar spirits stored outside of Kentucky. In other words, the market price being fixed by competition the owner of whisky stored in Kentucky could not sell his property until the other whisky had moved unless the owner of whisky in Kentucky were willing to sacrifice his goods and sustain a loss equivalent to the amount of the fifty cent license tax per gallon.

Further affiant saith not.

THOS. S. JONES.

**Affidavit of Milton Barkhouse**—Filed April 29, 1920.

The affiant, MILTON BARKHOUSE, being first duly sworn, on oath states:

I am a resident and citizen of Louisville, Jefferson County, Kentucky, and have been for practically eight years engaged in the business of distilling and selling distilled spirits, known as whisky, and am now Vice-President and acting Manager of the United American Company, a Kentucky corporation, at present engaged in the business of storing whisky, and up to January 1, 1920, extensively engaged in the business of selling whisky through the sale of warehouse receipts covering whisky in bond.

I am now and for years have been familiar with the market quotations on the value of whisky in bond, and such values fluctuate from time to time from various causes of supply and demand, enactment of laws and regulations, cost of transportation and location of goods; but speaking broadly, the value of whisky in bond during the past two months, and now, such as Kentucky Bourbon whisky, has been and is from eighty cents to one dollar and ten cents per proof gallon, original gauge, in bond. The amount of distilled spirits known as whisky stored in bond in Kentucky represents approximately 50% of such commodity, and there is stored in general and distillery bonded warehouses outside of the State of Kentucky, but in the United States, approximately 50% of such supply, and said supply outside of the State would meet the normal demands for five years or more to come, under the limited and restricted conditions now imposed upon the sale of such commodity. And for an owner of whisky stored in Kentucky to compete in the

market generally in the sale of his warehouse receipts with the owners of receipts covering whisky stored outside of Kentucky, it is and will be necessary for the owner of the receipts in Kentucky to absorb the loss or stand the tax imposed by the Vance Act on his goods; or in other words, in order to meet competition the owner of Kentucky whisky will be compelled to sell his goods from forty to fifty cents per proof gallon lower than the current market price outside of Kentucky, after allowing the usual and normal differential in price based upon the normally higher valuation of Rye whiskies of Pennsylvania and Maryland as compared with the normal price of Bourbon whiskies.

In my opinion and based on my experience in the business of distilling and selling whisky, and under the law of competition and supply and demand, the whiskies stored in Kentucky cannot be moved or sold in the trade, unless the owner sustains a loss equal to from 40 to 50% of the market value of his commodity, and if such tax were levied for two years it would represent practically 100% on the present market value of his goods.

Further affiant saith not.

MILTON BARKHOUSE.

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**Affidavit of George R. Landen**—Filed April 29, 1920.

The affiant, GEORGE R. LANDEN, being first duly sworn, on oath states:

I am a resident and citizen of Hamilton County, State of Ohio, and have for seventeen years been engaged in the whiskey brokerage business in the city of Cincinnati and have, since that time, dealt extensively in and kept posted as to the prices of distilled spirits of all kinds,

including Bourbon and Rye whiskies and Brandies, and I keep posted and am now posted approximately as to the location of distilled spirits in bond and from my best calculations state that substantially half of the distilled spirits in the United States is now located in the Bonded Warehouses in the district of Kentucky and substantially half is now located in other States of the Union.

The prices of Bourbon whiskey and Rye whiskey and Brandies fluctuate in the market from time to time from various causes, including legislation, regulations, location, supply and demand; and according to whether such whiskey be in Distillery Bonded Warehouses where the privilege of bottling in bond is permitted or in such Bonded Warehouses where the privilege of bottling in bond is not permitted. Rye whiskies as a rule always have sold at a higher price per proof gallon than Bourbon whiskies of the same age. From my knowledge of the whiskey business and the prices quoted on Bourbon whiskies located outside of the State of Kentucky in distillery and general Bonded Warehouses, the price of such Bourbon whiskey, of substantially the same age, quality and kind as the product of the Imperial Distilling Company product of 1916, has been, for whiskey in distillery Bonded Warehouses where the bottling privilege exists, One Dollar and Ten Cents (\$1.10) to One Dollar and Twenty Cents (\$1.20) per gallon, and for the same products in general Bonded Warehouses where bottling in bond is not permitted, from Eighty-Five Cents (\$.85) to One Dollar (\$1.00) per original proof gallon in bond.

To enable the owners of whiskey located in Kentucky to compete, in the sale of warehouse receipts, with the owners of whiskey of the same class located outside of the State of Kentucky, it is and will be necessary for the owners of the Kentucky whiskey to accept upon the sale

of their commodity, as much less as this 50 cents tax will amount to.

I have dealt in past years and up to the present time extensively in distilled spirits known as Kentucky Bourbon whiskey. Prior to the passage of the so-called Vance Act in Kentucky approximately seventy-five per cent or more of the demand for whiskey in this and other markets was for such Kentucky Bourbon whiskey as compared with twenty-five percent demand for other Bourbon and Rye whiskies located outside of the State of Kentucky. Since the passage of the so-called Vance Act, the demand for Kentucky Bourbon whiskey stored in Kentucky, represents less than twenty-five per cent of the demand of the trade as compared with seventy-five percent or more of demand for similar grades of whiskey stored outside of Kentucky.

And further affiant saith not.

GEORGE R. LANDEN.

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**Motion of John J. Craig and Chas. I. Dawson to Dismiss  
Bill of Complaint—Filed May 14, 1920.**

The defendants, John J. Craig, Auditor of the Commonwealth of Kentucky, and individually, and Charles I. Dawson, Attorney General of the Commonwealth of Kentucky, and individually, move the Court to dismiss the bill of complaint of the plaintiff herein, for the reason that plaintiff has an adequate remedy at law, and the bill does not state facts sufficient to support a cause of action against them, or either of them; and of this they pray the judgment of the Court.

CHAS. I. DAWSON,  
*Attorney General.*

**Affidavit of James Thompson**—Filed May 14, 1920.

The affiant, JAMES THOMPSON, being first duly sworn, on oath states :

I am a resident and citizen of Jefferson County, Kentucky, and have been for twenty years the President of the Glenmore Distilleries Company, in the Second District of Kentucky, engaged in the business of manufacturing and selling distilled spirits and the by-products resulting therefrom.

I am now and for years have been familiar with the cost of manufacturing distilled spirits, and especially such known as Bourbon whisky, and state that at the present time the cost of production of distilled spirits known as whisky, notwithstanding the abnormal high prices of the raw materials, grain, cooperage and labor, is about forty-five cents per gallon; and the carrying charges upon such whisky, until it is four years of age, the period at which distillers are permitted to bottle in bond, amount to approximately twenty-five cents per gallon.

I am familiar with the current market price of whiskies in bond generally with which distilled spirits known as whisky manufactured in Kentucky comes into direct competition, and such prices from various causes range from seventy-five cents to one dollar and twenty-five cents per original proof gallon on entry into bond.

I am also familiar with valuation placed upon whisky in bond in Kentucky by the Kentucky State Tax Commission, which Commission is charged with the duty, under the law of Kentucky, of valuing and assessing such distilled spirits known as whisky for state, county and city purposes; and the Kentucky State Tax Commission has for the last two years fixed and determined



the ad valorem value of whisky in bond in Kentucky at Twenty-five Dollars per barrel, containing approximately fifty gallons each.

I attach hereto as Exhibit 1 the original of the tax notice sent by the State Tax Commission through its official Secretary Ben Marshall, showing such assessment for the year 1919 on the assessment made as of September 1, 1918; and from my personal knowledge know that the same assessment was made as of September 1, 1919, for the year 1920, but I have misplaced the notice received, if, in fact, the official notice has been received.

Further affiant saith not.

JAMES THOMPSON.

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**Affidavit of John J. Craig—Filed May 14, 1920.**

The affiant, JOHN J. CRAIG, states that he is Auditor of Public Accounts of Kentucky, and one of the defendants named in the bill of complaint of plaintiff herein.

He says that it is insinuated in the bill in this case that he, as Auditor of Public Accounts, may attempt to exact an annual tax of fifty cents per proof gallon on all persons covered by the provisions of the Act of March 12, 1920, set out at length in the bill of complaint. He says that he is not attempting to claim that the license tax imposed therein is an annual license tax, but that the only claim that he asserts with reference to said tax is that it is paid only once, and that is to be made when the whiskey is removed from the bonded warehouse or transferred under bond to a bonded warehouse out of the State of Kentucky, and, regardless of the length of time the whiskey may have been in Kentucky in storage, the only tax exacted under this law is the fifty cents due and

payable at the time of removal or transfer, as above set out; that he has been advised by the Attorney General of the Commonwealth of Kentucky that this is the proper construction to be placed upon said act, and that he will be governed accordingly.

He further states that he does not believe it to be true that the act attacked in the bill of complaint in this case would result in prohibiting any of the businesses licensed by the said act, and he says this is especially true with reference to the character of business conducted by the plaintiffs in this case.

He says that since this bill has been filed he has made diligent inquiry for the purpose of ascertaining the prevailing market prices of whiskey when sold to the drug trade throughout the country, for the purpose of being sold by druggists at retail on prescription of physicians, as provided by Federal regulations, and that the price runs, in case goods, from over thirty dollars per case down to approximately twenty-two dollars and fifty cents per case, a case containing three gallons of whiskey, and that the prevailing price of whiskey in bulk runs from five dollars per proof gallon, for three-year old whiskey, up to approximately seven dollars per gallon for six and seven year old whiskey.

He files herewith as part hereof, as evidence of the market quotations on whiskey at the present time, the current price list issued by Crigler & Crigler, of Covington, to the trade, and also a price list issued by John D. Park & Son, under date of March 16, 1920.

He further states that at the present price of material and labor it costs \$4.20 per case to bottle and case a case of whiskey in quarts, a case containing three gallons. This is exclusive of the cost of the whiskey itself. Like-

wise, it costs \$4.70 to case a case of whiskey in pints, exclusive of the cost of the whiskey itself.

He says that the following is about the average charges on whiskey which must be paid and taken care of upon its removal from bond in Kentucky; Government tax, \$2.20 per gallon; State license tax, fifty cents per gallon freeing charge, which covers the natural wastage by evaporation, as ascertained on regauging, twenty-five per cent of its original cost; carriage charge, seven and one-half cents per gallon, per year, based on an original cost price of fifty cents.

JNO. J. CRAIG.

(SEAL)

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PRICE LIST.

Established 1874.

CRIGLER & CRIGLER.

Covington,

Kentucky.

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WOODLAND WHISKEY.

Bottled in Bond 100 Proof—Tax Paid.

12 Full Quarts,	\$26.00
24 Full Pints	\$27.00
48 Full Half Pints	\$27.50

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Quantity Discounts.

50 Cents per case less in 5 Case Lots.

\$1.00 per case less in 10 case lots.

\$1.50 per case less in 25 case lots or more.

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**WOODLAND WHISKEY.**

In Bulk Per Proof Gallon—Tax Paid.	
Age.	Per Proof Gallon.
3 Years Old	5.00
4 Years Old	5.25
5 Years Old	5.50
6 Years Old	6.00
7 Years Old	6.50

Proof on above runs from 102 to 105 depending on age. Barrels contain between forty and forty-five gallons, depending on age.

Terms: 1-2 Cash; Balance, draft bill of lading, attached when shipped by freight. When ordered shipped by express which is the quickest and safest way, Cash must be sent in advance for the full amount. All Shipments F O B Distillery. Prices subject to change without notice. No shipments made less than 2 cases or 5 gallons in bulk.

**JOHN D. PARK & SONS CO., Ltd.**  
Liquor Department.

Wholesale Proprietary Medicines,  
Chemicals, Drugs, etc.

609 Mercantile Library Building.

Cincinnati, O., March 16, 1920.

Mr. O. F. Baird,  
Louisville, Ky.

Dear Sir:

We have secured special concession for bottled in bond whiskey for medicinal purposes, and are now in position to quote greatly reduced prices as follows:

Single case lots,	\$26.00 (24 pints to the case)
5 case lots,	25.00
10 case lots,	24.00
25 case lots,	23.00
50 case lots,	22.00

We will furnish Old Taylor or Mellwood, two high grade well known brands.

In bulk will sell barrel lots, each barrel containing approximately 40 gallons, at \$5.00 per gallon, all taxes and charges paid, F. O. B. Cincinnati.

We can furnish Old Crow, Old Taylor, Blakemore or any popular brand. Goods guaranteed to be straight 100 proof.

Should you feel inclined to purchase warehouse certificates and have same tax paid yourself, we will furnish one barrel certificates in any quantity at the following prices:

Old Crow,	1.65
Mellwood,	1.50
Old Taylor,	1.65
Glenmore,	1.50
Blakemore,	1.50

These brands are from three to four years old.

Very truly yours,

John D. Park & Sons Co., Ltd.,

SF:H.

LIQUOR DEPARTMENT.

P. S. Advise you to buy now as the Kentucky Legislature has added an additional tax of 50 cents per gallon on whiskey which will again advance prices.

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**Affidavit of Elwood Hamilton—Filed May 14, 1920.**

The affiant, ELWOOD HAMILTON, states that he was on and prior to the sixteenth day of January, 1920, Collector of Internal Revenue of the United States for the District of Kentucky, and has been such collector at all times since said date, and as such Collector it is his duty to receive for the government of the United States all government tax due on distilled spirits within his district, and he has in his custody records showing the amount of whiskey sold and removed from government bonded warehouses in the District of Kentucky at all dates begin-

ning with the sixteenth day of January, 1920, and up to and including the present date.

He states that prior to the sixteenth day of January quite a quantity of liquor was removed from distillery bonded warehouses and stored in export bonded warehouses for the purpose of being bottled for export; and that a good deal of such whiskey so stored in export bonded warehouses was not removed prior to January sixteenth, and as a consequence a considerable quantity of such liquor has been sold for medicinal purposes from such export bonded warehouses since the sixteenth of January; but in the figures which are made part of this affidavit the liquor so removed from export bonded warehouses and which had been transferred there prior to the sixteenth day of January, 1920, is not included.

He states that beginning with the sixteenth day of January, 1920, and up to and including the last day of January, 1920, there was tax paid and removed from distillery bonded warehouses in Kentucky, 15,464.3 gallons of whiskey; that for the month of February, 1920, there was tax paid and removed from such bonded warehouses in Kentucky 121,226.6 gallons of whiskey; that from the first day of March, 1920, up to and including the eleventh day of March, 1920, on which date the Kentucky law imposing a license tax of fifty cents per gallon on whiskey became effective, there was tax paid and removed from such bonded warehouses in Kentucky, 140,152.7 gallons of whisky; that from the twelfth day of March, 1920, which, as stated above, was the date on which the Kentucky law imposing a license tax of fifty cents per gallon on whiskey became effective, up to and including the last day of March, 1920, there was tax paid and removed from such warehouses in Kentucky, 165,084.3 gallons of whis-

key; and that for the month of April, 1920, there was tax paid and removed from such bonded warehouses in Kentucky, 254,159.3 gallons of whiskey, and that the total amount which has been taxpaid and removed in Kentucky beginning with and including the twelfth day of March, 1920, and up to and including the last day of April, 1920, is 419,243.6 gallons, and that, as aforesaid, these figures do not embrace such liquor as was transferred from distillery bonded warehouses to export bonded warehouses under permit of the Government for bottling for exportation prior to the sixteenth day of January, 1920, and which still was left on hand in such warehouses on and after the sixteenth day of January, 1920.

He files herewith as part of this affidavit itemized, detailed statement, showing the number of gallons removed and tax-paid each day beginning with January sixteenth, 1920, and up to and including the last day of April, 1920.

ELWOOD HAMILTON.

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1920 Jan.	Gallons
16	579.7
17	431.2
19	1,482.5
20	740.0
21	1,586.5
22	371.3
23	594.2
24	166.4
26	1,443.7
27	417.8
28	1,618.1
29	1,526.5
30	4,506.4
<b>TOTAL</b>	<b>15,464.3</b>

*Affidavit of Elwood Hamilton*

Feb.	
2	1,483.5
3	3,095.6
4	6,798.1
5	5,133.4
6	2,164.0
7	4,730.7
9	1,983.0
10	2,442.0
11	2,396.3
12	2,948.0
13	8,628.6
14	3,658.7
16	6,413.2
17	4,740.0
18	3,915.7
19	3,199.0
20	8,112.6
21	6,767.1
24	10,843.9
25	12,263.3
26	9,320.0
27	10,179.9
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TOTAL	121,226.6

Mar.	
1	3,450.4
2	8,857.6
3	9,184.6
4	8,497.3
5	9,393.4
6	12,859.3
8	8,001.6
9	44,440.8
10	5,470.4
11	11,218.5
12	18,778.8
13	9,924.4
15	19,728.9
16	19,528.9
17	6,968.7
18	4,362.1
19	1,740.8
20	4,889.0



*Affidavit of Elwood Hamilton*

39

1920	Gallons
Mar.	
22	10,595.1
23	13,268.5
24	3,964.0
25	13,819.6
26	14,924.7
27	17,193.2
29	10,568.6
30	8,105.1
31	5,503.1
TOTAL	305,237.00

Apr.	
1	14,607.9
2	6,373.8
3	10,307.3
5	10,064.9
6	13,198.2
7	14,175.5
8	11,883.0
9	9,214.8
10	7,909.7
12	8,755.8
13	4,595.9
14	7,312.5
15	6,240.4
16	11,595.1
17	7,425.2
19	4,611.3
20	6,006.3
21	6,831.5
22	11,786.2
23	6,275.7
24	12,662.7
26	8,909.9
27	13,043.2
28	17,554.5
29	12,392.5
30	10,425.9
TOTAL	254,159.30

**Motion to Stay Proceedings—Filed May 14, 1920.**

Defendants, John J. Craig, Auditor of the Commonwealth of Kentucky, and individually, and Charles I. Dawson, Attorney General of the Commonwealth of Kentucky, and individually, represent to the Court that there is now pending in the Franklin Circuit Court of Franklin County, Kentucky, a suit, wherein S. Rosenbloom & Company are the plaintiffs and E. H. Taylor, Jr. & Sons, John J. Craig, Auditor of the Commonwealth of Kentucky, and Charles I. Dawson, Attorney General of the Commonwealth of Kentucky, are parties defendant; that said suit involves the validity of the Act of the General Assembly of the Commonwealth of Kentucky, approved March 12, 1920, referred to and embodied in the Bill of the plaintiffs in this case. They represent to the Court that said Franklin Circuit Court is a Court of original and general jurisdiction, and has jurisdiction both of the subject matter involved in said suit and of the person of these defendants, and of their co-defendant, E. H. Taylor, Jr. & Sons, and the said Court has jurisdiction under the laws of the Commonwealth of Kentucky to enforce the act attacked in the said proceeding and attacked in the proceeding in this case.

They state that there has been issued and served upon them in the case pending in the Franklin Circuit Court above referred to a temporary restraining order issued by the Clerk of the Franklin Circuit Court, enjoining and restraining these defendants and each of them from enforcing said act or its penalties, by suit or indictment or otherwise, until further orders of the Court. They state that it is their purpose to press to a final conclusion the litigation now pending in the Franklin Circuit Court as speedily as can be done, and they say that by virtue

of the said proceeding now pending in the Franklin Circuit Court, as above set out, under the provisions of Section 266 of the Judicial Code, proceedings in this Court should be stayed until the final determination of the said suit now pending in the Franklin Circuit Court.

They file in support of their motion a certified copy of the record of the suit now pending in the said Franklin Circuit Court.

WHEREFORE, they move the Court that it stay proceedings herein until the final determination of the suit now pending in the State Court aforesaid.

CHAS. L. DAWSON,

*Attorney General.*

**Transcript of Record in Case of Sol Rosenbloom vs. E. H. Taylor, Jr. & Sons (Inc.)—Franklin (Ky.), Circuit Court—Filed May 14, 1920.**

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Sol. Rosenbloom, trading as S. Rosenbloom  
& Company, Plaintiff,  
vs.  
E. H. Taylor, Jr. & Sons (Inc.), Defendant.

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**Petition in Equity.**

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The plaintiff, says that he is a wholesale liquor dealer located at Pittsburg, Penna., and a resident there trading and doing business under the name of S. Rosenbloom & Co., and in 1917 became the owner of several hundred barrels of distilled spirits—whiskey—by purchase from the defendant, E. H. Taylor, Jr. & Sons, a corporation organized under the laws of the State of Kentucky, and engaged in the manufacture of distilled spirits, to-wit: whiskey, and having its Home Office at Frankfort in Franklin County, Kentucky, with its distilling plant and warehouses situated in Woodford County, near Frankfort, Kentucky.

The plaintiff says that the warehouse certificates for said whiskey were delivered to him at the time of the purchase, but that the whiskey itself remained in the aforementioned warehouses. He says that about December, 1919, desiring to have certain of their said whiskey bottled in bond for export, to-wit: some two thousand (2,000) cases, they delivered to the defendant, warehouse receipts to cover that quantity of the barrel goods aforesaid, and after complying with all the regulations of the United States Revenue Laws affecting the removal and transfer of said goods in bulk under bond to another warehouse on the distillery premises, for bottling purposes, he caused the defendant to make such removal and upon such removal and transfer, to report to the Auditor of Public Accounts and pay into the Treasury of the Com-

monwealth of Kentucky, through said Auditor, the license tax of Two (2c) Cents on every proof gallon of said distilled spirits as was liable for taxation by the Federal Government, the quantity thereof being fixed and measured by the State Tax Commission. That said report and payment are shown in the report made in January, 1920.

The plaintiff says that while said whiskey was bottled in bond at a time when it could have been exported for beverage purposes, transportation could not be obtained in time for the shipment prior to January 16th, 1920, but said whiskey is yet entitled to be exported or used domestically for medicinal purposes.

That they have complied with all the government regulations concerning their right to sell and dispose of said whiskey, and with the necessary permits to do so, they have sold same for medicinal purposes and are entitled to its immediate possession for the purpose of shipment to the purchaser.

The plaintiffs say that for the purpose of having said bottled in bond goods shipped to the purchaser, they did on March 22nd, 1920, demand of the defendant the immediate possession of said two thousand (2,000) cases of whiskey and made preparations to load same on the cars at Taylorton, the railway station at the plant of the defendant, and had workmen at hand ready to engage in the work of loading same into cars procured for said purpose. That the defendant without right interfered with the work of its agents and servants in preparing to ship said goods and did so on the sold ground that a license tax of Fifty (50c) Cents on the gallon had been imposed on the whiskey of the plaintiffs by an Act of the General Assembly entitled

AN ACT imposing license tax upon every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits known as whiskey or brandy or other species of double stamp spirits in this State, and upon every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in this state, and in removing same therefrom for the purpose of sale, or for any other purpose; providing for monthly reports by distilleries and bonded ware-

housemen, for the purpose of ascertaining the amount of tax due; providing for monthly payments of the amount of license tax due fixing a penalty for failure to make such monthly report and settlement; providing for the manner of distribution of the taxes so collected, repealing all other license, franchise and excise taxes on the businesses covered by this Act; and declaring an emergency to exist."

And which Act was approved on March 16th, 1920, and became effective on that date, and for which tax the defendant claims it would be liable in the event said whiskey was subject to said tax.

That the defendant has refused to permit the plaintiffs, or their agents and servants, to load said whiskey on the cars prepared for its shipment as aforesaid, unless and until the plaintiffs should pay said tax or agree to reimburse it for its payment of same. And so the defendant continues to interfere with and prevent their agents and servants from doing said work.

The plaintiffs further charge that the bottled in bond whiskey named, having been transferred and removed once from the warehouse and the license tax of Two (2c) Cents per gallon having been paid, it cannot be subjected to further or other license tax, nor, as they are advised, can it be subjected under the terms of the Act of March 16th, 1920, to the Fifty-cent per gallon tax.

The plaintiffs say that the defendant is holding their whiskey without right and that they do not owe any further tax on the cases named.

They state that unless the defendant be enjoined and restrained from any further interfering with and preventing their agents and servants in the work of loading the plaintiff's whiskey on the cars, and preventing its delivery for shipment to the purchaser thereof, they will suffer great and irreparable injury, that no injunction herein has been applied for or refused by the Court or any Circuit Judge. He files herewith a copy of the Act of 1920, same not yet having appeared in printed form.

WHEREFORE, the plaintiffs pray that the defendant be enjoined from interfering with the plaintiffs, or his agents and servants in their work of taking possession of the two thousand (2,000) cases involved and loading same for shipment, and from further refusing the demand of the plaintiffs, for a mandatory order to defendant to

deliver said cases to the plaintiffs, and for all proper and appropriate relief.

HAZELRIGG & HAZELRIGG,  
*Attorneys for Plaintiff.*

Copy—

Attest:

Kelly C. Smither, C. F. C. C.

By

D. C.

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IN HOUSE,  
REGULAR SESSION, 1920.

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HOUSE BILL No. 513.  
THURSDAY, FEBRUARY 26, 1920.

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Mr. Vance introduced the following bill, which was ordered to be printed and referred to the Committee on Revenue and Taxation, viz.:

AN ACT imposing an annual license tax upon every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits known as whiskey or brandy or other species of double stamp spirits in this state, and upon every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in this state, and in removing same therefrom for the purpose of sale, or for any other purpose; providing for monthly reports by distilleries and bonded warehousemen, for the purpose of ascertaining the amount of tax due; providing for monthly payments of the amount of license tax due; fixing a penalty for failure to make such monthly report and settlement; providing for the manner of distribution of the taxes so collected; repealing all other license, franchise and excise taxes on the businesses covered by this Act; and declaring an emergency to exist.

*Be it enacted by the General Assembly of the Commonwealth of Kentucky:*

1. Every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits, known as whiskey or brandy or other species of double stamp spirits, in this state; and every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in this state, and in removing same therefrom for the purpose of sale or for any other purpose, shall pay an annual license tax to the Commonwealth of Kentucky of fifty cents on every proof gallon of said distilled spirits so manufactured or stored in a bonded warehouse, or withdrawn from a bonded warehouse, or transferred therefrom under bond out of the Commonwealth of Kentucky.

2. Every corporation, association, partnership and individual owning, controlling or operating a bonded warehouse in this state, wherein distilled spirits known as whiskey or brandy or other species of double stamp spirits are stored, shall, on or before the first day of June, 1920, on blanks furnished by the Auditor of Public Accounts, report to the Auditor of Public Accounts the total amount of such spirits stored in a bonded warehouse owned, controlled or operated by such corporation, association, partnership or individual; and shall make monthly report to the Auditor of Public Accounts thereafter, which reports must be signed and sworn to by such persons, or in case of a corporation, association or partnership, by some officer or person authorized to make such oath. The first report provided for herein shall show the number of proof gallons of such spirits withdrawn from said warehouse from the date this Act becomes effective to the date of making such report; and each monthly report thereafter shall show the number of proof gallons placed in said bonded warehouse since the date of making the last preceding report, the number of proof gallons withdrawn or transferred since the date of making the last preceding monthly report, and the aggregate number of gallons on hand at the date such report is made. In all cases where such spirits are transferred under bond from one bonded warehouse in this Commonwealth to another, said report shall show the warehouse from which same has been transferred and the



warehouse to which same has been transferred, the quantity thereof and the serial number of each of the packages so transferred.

3. Every person, corporation, association or partnership operating, owning or controlling such bonded warehouse, shall, at the time said reports herein provided for are made, pay to the Auditor of Public Accounts the tax of fifty cents per proof gallon upon each proof gallon of such spirits removed from the warehouse owned, controlled or operated by such person, corporation, association or partnership, or transferred under bond out of this state, up to the date of making such report; and for the purpose of securing the payment of the license taxes herein provided for, the Commonwealth shall have a lien on all such spirits stored in such bonded warehouses, together with the other property of the bonded warehouseman used in connection therewith; and in all cases where the spirits so removed or transferred were owned or controlled by another than the bonded warehouseman, then the bonded warehouseman shall collect and pay the tax due on such spirits so removed or transferred under bond, and shall be subrogated to the lien of the Commonwealth.

4. Every corporation, association, partnership and individual engaged in distilling spirits known as whiskey or brandy or other species of double stamp spirits in this state, shall pay the license tax herein provided upon all such spirits so manufactured and removed from the premises without being placed in a bonded warehouse at the date of the removal of such spirits; and all such corporations, associations, partnerships and individuals engaged in the business of distilling such spirits in this state shall file monthly statements with the Auditor of Public Accounts, on blanks to be furnished by the Auditor, which statements must be sworn to and which statements shall show the number of proof gallons of such spirits so distilled and removed from the premises without having been stored in a bonded warehouse, and at the time of filing such statements shall pay to the Auditor of Public Accounts the amount due on such spirits so manufactured and removed; and for the payment of the taxes due under this provision, the Commonwealth shall have a lien upon all the machinery and the premises and the manufactured spirits made thereon, of the corporation, association, partnership or individual engaged in such distilling business.

5. Every person, corporation, association or partnership failing to make the reports herein provided for, in the manner herein provided for, and failing to pay the taxes as they become due, as herein provided for, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than five hundred dollars nor more than one thousand dollars, and each day after the date such report is due that such person, corporation, association or partnership is in default shall be treated and considered as a separate offense.

6. The tax herein provided for, when collected, shall be distributed as follows: To the State Road Fund, sixty-five per cent thereof; to the General Expenditure Fund, thirty-five per cent thereof.

7. The license tax herein imposed shall be in lieu of all other license, franchise or excise taxes now imposed by law on persons, corporations, partnerships or associations engaged in business covered by this Act; and all Acts in conflict therewith are hereby repealed, and especially there is hereby repealed Chapter 5 of the Acts of the Special 1917 Session of the General Assembly of Kentucky.

8. Whereas, many persons, corporations, association and partnerships are now engaged in the business covered and licensed by this Act, without paying an adequate license tax to the Commonwealth of Kentucky therefor; and whereas, the liquor which they are handling and in which they are dealing is constantly in large quantities being removed from the bonded warehouses and disposed of, without the state securing an adequate license tax thereof, an emergency is hereby declared to exist, and this Act shall take effect from and after the date of its passage and approval by the Governor.

Copy—

Attest:

Kelly C. Smither, C. F. C. C.

By

D. C.

## FRANKLIN CIRCUIT COURT.

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S. Rosenbloom & Company,

Plaintiffs,

vs.

E. H. Taylor, Jr. &amp; Sons (Inc.),

Defendants.

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**Answer.**

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The defendant, E. H. Taylor, Jr. & Sons (Inc.), for its answer herein admits that it is a corporation organized under the laws of Kentucky, and at all the times mentioned in the petition was engaged in the business of manufacturing distilled spirits known as whiskey, with distilling plant and warehouses situated in Woodford County, Ky., and home office at Frankfort, Ky. The defendant further admits that the plaintiffs in 1917 were the owners of several hundred barrels of whiskey purchased by it of the defendant, and which were stored in bulk in barrels in the warehouses of the defendant, warehouse certificates for which were issued and delivered to the plaintiffs.

That on October 14th, 1919, the defendant received directions from the plaintiff to bottle in bond for them one hundred and eighty-five (185) barrels and one hundred (100) barrels of their said whiskey, designating the serial numbers thereof, for the purpose of exporting same from the United States, and directed the defendant to pay all the taxes due thereon, State and County, and the special tax of two (2c) cents on the gallon thereof, and thereupon the defendant transferred said barrels of whiskey under bond, or removed them into the bottled in bond warehouse in order to bottle same in bond, and as directed, paid the County and State taxes thereon for the plaintiff including the sum due the State for the two-cent tax amounting to \$148.68, being the special tax on the 185 barrels, and the sum of \$79.12, being the said two cents on the gallon, special tax, on the 100 barrels, and which sums were paid to the State of Kentucky, as shown

on its January 1st, 1920, report to the Auditor of Public Accounts, together with other payments of a like character. It files herewith a statement of the transactions with respect to the 185 and 100 barrels, and which include the cases named in the petition as ordered for medicinal purposes, and of the detention of which complaint is made in the petition.

That for further answer, it denies that the plaintiff is entitled to the immediate possession of the two thousand (2,000) cases named in its petition.

That under the Act of the General Assembly approved March 16th, 1920, and entitled as set out in plaintiff's petition, a copy of which is filed therewith, a tax of fifty (50c) cents on each proof gallon is levied on each owner of such whiskies, engaged in the business of owning and storing such spirits in bonded Warehouses in this State, and in removing same therefrom for the purpose of sale, or for any other purpose, and that the plaintiff is so engaged and his said two thousand (2,000) cases so stored as set out in his petition, and same are apparently liable to the said fifty-cent tax, and for which tax the defendant, as warehouseman, is also liable if it permits a removal thereof unless said spirits are tax paid. And for this reason defendant admits it is interfering and preventing such removal as set out in the petition.

The defendant is informed that aside from the question of construction of the Act, that there may be a question as to the validity of said tax, and to protect itself as far as may be, submits that it is entitled to hold said whiskey until that question is determined by some Court of competent jurisdiction.

WHEREFORE, it prays to be dismissed with its costs and for all proper relief.

C. C. TURNER,

*Attorney for Defendant.*

FRANKLIN CIRCUIT COURT.

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S. Rosenbloom & Company,

Plaintiffs,

vs.

E. H. Taylor, Jr., & Sons,

Defendants.

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**Reply and Cross-petition.**

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1. For reply the plaintiff denies that the two thousand cases of whiskey herein are liable to the said fifty-cent tax, and for which tax the defendant, E. H. Taylor, Jr., & Sons, is liable if it permits a removal thereof unless said spirits are tax-paid.

2. The plaintiff admits that the whiskey involved herein is under the terms of the Act mentioned and set out by the defendant in its answer, apparently liable to the fifty-cent tax imposed by that Act, but the plaintiff says the said Act of the General Assembly of Kentucky, approved March 16th, 1920, and entitled:

“AN ACT imposing an annual license tax upon every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits known as whiskey or brandy or other species of double stamp spirits in this State, and upon every corporation, association partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in this state, and in removing same therefrom for the purpose of sale, or for any other purpose; providing for monthly reports by distilleries and bonded warehousemen, for the purpose of ascertaining the amount of tax due; providing for monthly payments of the amount of license tax due; fixing a penalty for failure to make such monthly report and settlement; providing for the manner of distribution of the taxes

so collected; repealing all other license, franchise and excise taxes on the business covered by this Act; and declaring an emergency to exist."

is unconstitutional and an illegal and unlawful exaction and unlawful exercise of Legislative power.

That it is a revenue measure purely though raised by a license tax and is confiscatory in its character and sense, and imposes a tax wholly out of proportion to the value of the license conferred and of the article taxed, and said exaction is beyond the limits of any reasonable profit derivable from the manufacture and sale of the article taxed, or the cost of regulation and licensing such manufacture and sale. That the basic commercial value of whiskey generally is about One Dollar per gallon.

That said Act violates the constitution of the State of Kentucky, and particularly Section 171 and 172 thereof requiring uniformity of taxation within the territorial limits of the authority imposing the tax.

That said tax is discriminatory in its nature and adds a greater burden on whiskey than on other personal property, and property of like value, and on business and occupations of equal and like character and value, and no such confiscatory or discriminatory tax is imposed on owners or holders of similar property in other states and who are competitors with plaintiff in the business named.

That an enforcement of said Act will result in taking private property for public purposes without just compensation and without due process of law, and deprives the owners of such property and warehousemen in charge thereof the equal protection of the law in violation of the 14th Amendment of the Constitution of the United States.

That the defendant, John J. Craig, is the Auditor of Public Accounts in and for the Commonwealth of Kentucky and is charged with the duty of requiring the reports provided for under said Act, and further charged on behalf of the State with the collection of said tax, and is threatening to and is about to collect same by requiring said reports and subjecting the plaintiff to indictment and heavy fines and penalties for failing to report and pay said tax as provided in said Act, and is threatening to institute civil actions as well to require said reports and enforce said collection, and said Craig has demanded of the plaintiff, as well as of the defendant, the payment

of said tax on the whiskey in question, and which tax the plaintiff admits the defendant, E. H. Taylor, Jr., & Sons, is likewise liable for under the terms of said Act. That the said defendant, Craig, as Auditor, has warned the plaintiff, and presumably the defendant, that if said whiskey is removed from the warehouse where it is now stored they will be proceeded against forthwith for the collection of said tax, and the enforcement of the penalties imposed by the Act.

That Honorable Chas. I. Dawson is the Attorney General of the Commonwealth of Kentucky, and he head of its legal department, and charged with the duty of enforcing said Act of March 16, 1920, and is threatening to enforce same, and the penalties therein provided, and will do so unless enjoined.

The plaintiff charges that the defendants, John J. Craig, as Auditor aforesaid, and Charles I. Dawson, Attorney General, are the proper and necessary parties hereto, and this Court is asked that they be made such parties and that process of this Court be issued against them, and they are now made such parties and process is asked against them. That the Hon'ble Robt. L. Stout is now absent from this city and that no injunction herein against the prosecution of this action has been refused by the Court or other Circuit Judge.

The plaintiff says that unless the defendants, Chas. I. Dawson, Attorney General, and John J. Craig the defendants are made parties hereto, and are immediately enjoined and restrained from enforcing said Act of March 16, 1920, and from requiring the plaintiff and the defendant, E. H. Taylor, Jr., & Sons, from reporting and paying the taxes on said whiskey the plaintiff will suffer great and irreparable injury, and especially so from the delay in giving notice of this application and plaintiff has no remedy at law available to him to prevent said injury and wrong.

WHEREFORE the plaintiff prays that Chas. I. Dawson, Attorney General, and the said John J. Craig, Auditor aforesaid, be made parties defendants hereto on behalf of the Commonwealth of Kentucky, and that said cross-defendants be enjoined and restrained from requiring said reports of said whiskey to be made and from collecting the said fifty-cents per gallon tax thereon, and from enforcing the provisions of the Act of March 16, 1920, and that the plaintiff be allowed to remove his whis-

key without the payment of said tax and that said Act of March 16th, 1920, be held to be invalid and unconstitutional, and for judgment for costs and all proper relief.

HAZELRIGG & HAZELRIGG,  
For Plaintiffs.

STATE OF KENTUCKY, }  
COUNTY OF FRANKLIN. } SCT:

Affiant, J. H. Hazelrigg, says that he is the attorney of plaintiff, S. Rosenbloom & Company, who is absent from this county and that the statements of the foregoing Reply and Cross-Petition are true.

J. H. HAZELRIGG.

Subscribed and sworn to before me by J. H. Hazelrigg, this 8th day of May, 1920.

KELLY C. SMITHER.

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FRANKLIN CIRCUIT COURT.

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S. Rosenbloom & Company,	Plaintiffs,
vs.	
E. H. Taylor, Jr., & Sons, (Inc.), etc.,	Defendants.

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**Amended Petition.**

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The plaintiff for amendment to his original petition says that the Act of the General Assembly of Kentucky, approved March 16th, 1920, and entitled:

"AN ACT imposing an annual license tax upon every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits known as whiskey or brandy or other species of double stamp spirits in this State, and upon every corporation, association, partnership and



individual engaged in the business of owning and storing such spirits in bonded warehouses in this state, and in removing same therefrom for the purpose of sale, or for any other purpose; providing for monthly reports by distilleries and bonded warehousemen, for the purpose of ascertaining the amount of tax due; providing for monthly payments of the amount of license tax due; fixing a penalty for failure to make such monthly report and settlement; providing for the manner of distribution of the taxes so collected; repealing all other license, franchise and excise taxes on the business covered by this Act; and declaring an emergency to exist,"

is unconstitutional and an illegal and unlawful exaction and unlawful exercise of legislative power.

That it is a revenue measure purely though raised by a license tax and is confiscatory in its character and sense, and imposes a tax wholly out of proportion to the value of the license conferred and of the article taxed, and said exaction is beyond the limits of any reasonable profit derivable from the manufacture and sale of the article taxed, or the cost of regulation and licensing such manufacture and sale. That the basic commercial value of whiskey generally is about One Dollar per gallon.

That said Act violates the constitution of the State of Kentucky, and particularly Sections 171 and 172, thereof requiring uniformity of taxation within the territorial limits of the authority imposing the tax.

That said tax is discriminatory in its nature and adds a greater burden on whiskey than on other personal property, and property of like value, and on business and occupations of equal and like character and value, and no such confiscatory and discriminatory tax is imposed on owners or holders of similar property in other states and who are competitors with plaintiff in this business named.

That an enforcement of said Act will result in taking private property for public purposes without just compensation and without due process of law, and deprives the owners of such property and warehousemen in charge thereof the equal protection of the law in violation of the 14th Amendment of the Constitution of the United States.

That the defendant, John J. Craig, is the Auditor of Public Accounts in and for the Commonwealth of Ken-

tucky and is charged with the duty of requiring the reports provided for under said Act, and further charged on behalf of the State with the collection of said tax, and is threatening to and is about to collect same by requiring said reports and subjecting the plaintiff to indictment and heavy fines and penalties for failing to report and pay said tax as provided in said Act, and is threatening to institute civil actions as well to require said reports and enforce said collection, and said Craig has demanded of the plaintiff, as well as of the defendant, the payment of said tax on the whiskey in question, and which tax the plaintiff admits the defendant, E. H. Taylor, Jr., & Sons, is likewise liable for under the terms of said Act. That the said defendant, Craig, as Auditor, has warned the plaintiff, and presumably the defendant, that if said whiskey is removed from the warehouse where it is now stored they will be proceeded against forthwith for the collection of said tax, and the enforcement of the penalties imposed by the Act. That Honorable Charles I. Dawson, is the Attorney General of the Commonwealth of Kentucky, and the head of its legal department and charged with the duty of enforcing said Act of March 16th, 1920, and is threatening to enforce same and the penalties therein provided by civil actions and by indictments and other criminal proceedings and will do so unless enjoined.

The plaintiff charges that the defendants, John J. Craig, as Auditor aforesaid, and defendant, Charles I. Dawson, Attorney General, are proper and necessary parties hereto, and this Court is asked that they be made such parties and that process of this Court be issued against them, and they are now made such parties and process is asked against them. That the Honorable Robert L. Stout, Circuit Judge of this County, is now absent from this county and that no injunction herein against the prosecution of this action has been refused by this court or other Circuit Judge.

The plaintiff says that unless the defendants, Charles I. Dawson, Attorney General, and John J. Craig, Auditor, are made parties hereto, and are enjoined and immediately restrained from enforcing said Act of March 16th, 1920, and from requiring the plaintiff and the defendant, E. H. Taylor, Jr., & Sons, from reporting and paying the taxes on said whiskey the plaintiff will suffer great and irreparable injury and especially so from the delay arising in giving notice of this application, and plaintiff

has no remedy at law available to him to prevent said injury and wrong.

WHEREFORE, the plaintiff prays that Charles I. Dawson, Attorney General, and said John J. Craig, Auditor aforesaid, be made parties defendants hereto on behalf of the Commonwealth of Kentucky, and that said cross-defendants be enjoined and restrained from requiring said reports of said whiskey to be made and from collecting the said fifty-cent per gallon tax thereon, and from enforcing the provisions of the Act of March 16th, 1920, or its penalties by civil actions or by indictments or otherwise, and that the plaintiff be allowed to remove his whiskey without the payment of said tax and that said Act of March 16th, 1920, be held to be invalid and unconstitutional, and for judgment for costs and all proper relief.

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*For Plaintiff.*

State of Kentucky, }  
Franklin County. } *Sct.*

Affiant, J. H. Hazelrigg, says that he is the attorney for plaintiff, S. Rosenbloom & Company, who is absent from the county and that the statements of the foregoing amended petition are true.

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Subscribed and sworn to before me by J. H. Hazelrigg  
this 12 day of May, 1920.

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*F. C. C.*

## FRANKLIN CIRCUIT COURT.

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S. Rosenbloom & Company,

Plaintiffs,

vs.

E. H. Taylor, Jr., &amp; Sons, (Inc.), etc.,

Defendants.

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**Temporary Restraining Orders.**

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*The Commonwealth of Kentucky,*

To defendants, Charles I. Dawson, Attorney-General and John J. Craig, Auditor of Public Accounts of the State of Kentucky:

You are hereby enjoined from requiring from the plaintiff or his agents or distiller in charge, payment of the fifty-cent per gallon license tax on his whiskies described in the petition and stored in bond in the Old Taylor warehouses in Woodford County, Kentucky, and which tax is attempted to be imposed thereon under an act of the General Assembly, approved March 16th, 1920, and from enforcing said act or its penalties by suit or indictment or otherwise, until the further orders of the court.

Witness, KELLY C. SMITHER, Clerk of the Franklin Circuit Court this 12th day of May, 1920.

KELLY C. SMITHER,  
F. C. C.

FRANKLIN CIRCUIT COURT.

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S. Rosenbloom & Company, Plaintiffs,  
vs.  
E. H. Taylor, Jr., & Sons, (Inc.), etc., Defendants.

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**Order Granting Temporary Restraining Order.**

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This day came the plaintiffs, S. Rosenbloom & Company, and on their motion a temporary restraining order is granted them, according to the prayer of their amended petition and reply and cross-petition upon their executing bond conditioned according to law, in the penalty of two thousand dollars; whereupon said plaintiffs with United States Fidelity & Guaranty Co. as their surety entered into and acknowledged bond to the defendant, John J. Craig, Auditor and defendant, C. I. Dawson, Attorney General, as required by this order, which is approved and filed.

This May 12th, 1920.

KELLY C. SMITHER,  
*Clerk F. C. C.*

I, Kelly C. Smither, Clerk of the Franklin Circuit Court, certify that the foregoing is a full, true and correct copy of all the pleadings filed and orders made, and returns thereon, in the Franklin Circuit Court, in the case wherein S. Rosenbloom & Company are the plaintiffs and E. H. Taylor, Jr. & Sons, Incorporated, and John J. Craig, Auditor of Public Accounts of the Commonwealth of Kentucky, and Charles I. Dawson, Attorney General of the Commonwealth of Kentucky, are the defendants, as appears of record in my office.

Witness my hand and seal, this the 13th day of May, 1920.

KELLY C. SMITHER,  
*Clerk Franklin Circuit Court.*

I, Robert L. Stout, Judge of the Franklin Circuit Court, certify that Kelly C. Smither is the duly elected, qualified and acting Clerk of the Franklin Circuit Court, and that the signature to the above certificate is the genuine signature of said Kelly C. Smither, and the seal attached thereto the seal of the Franklin Circuit Court, and that said certificate and attestation of said clerk is in due form of law.

WITNESS my hand as Judge of the Franklin Circuit Court, this the 13th day of May, 1920.

ROBT. L. STOUT,  
*Judge Franklin Circuit Court.*

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**Separate Answer of John J. Craig, Auditor of the Commonwealth of Kentucky and Individually, and Charles I. Dawson, Attorney General of the Commonwealth of Kentucky and Individually—Filed May 14, 1920.**

The defendants, John J. Craig, Auditor of the Commonwealth of Kentucky, and as an individual, and Charles I. Dawson, Attorney General of the Commonwealth of Kentucky, and as an individual by way of answer and defense herein says that the bill in this case is without equity because the plaintiff has an adequate remedy at law and in this respect they show the Court that Section 162 of Kentucky Statutes provides as follows:

“When it shall appear to the Auditor that money has been paid into the Treasury for taxes when no such taxes were in fact due, he shall issue his warrant on the Treasury for such money so improperly paid, in behalf of the person who paid the same. Nothing herein contained shall authorize the issuing of any such warrant in favor of any person who may have made payment of the revenue tax due on any tract of land, unless it is manifest that the whole of the tax due, the Commonwealth on such land has been paid,

independent of the mistaken payment, and ought to be reimbursed."

They state that under the provision of this Act as interpreted by the Court of Appeals of Kentucky, the Court of last resort in this State, the plaintiff would be entitled to receive from the Auditor of Public Accounts of Kentucky any taxes he may be required to pay under the provisions of the Act which attacked in the Bill of Complaint in this proceeding, should it be determined that the said Act is unconstitutional or that the tax exacted thereunder was not due.

Further answering they say that they have no information as to the truth of the allegations contained in paragraph I of the Bill of Complaint as to the said J. and A. Freiberg Company being a corporation created and organized under and pursuant to the laws of the State of Ohio. They have no information as to the truth of the allegation contained in said paragraph I of the Bill that the plaintiff is a citizen of the state of Ohio and not a citizen of the state of Kentucky.

They say that they have no information of the truth of the allegation in the Bill of Complaint as contained in paragraph I thereof that the matter or amount in dispute in this case exceeds the value of \$3,000.00 exclusive of interest and costs.

They say that they have no information of the truth of the allegation contained in paragraph 3 of the Bill of Complaint to the effect that the plaintiff more than three years ago to-wit, in October, 1916, purchased from T. E. O'Keefe, proprietor of the Imperial Distillery No. 8 Central District of Kentucky, located at Stanley, Kentucky, the amount or character of distilled spirits set forth in said paragraph of the bill of complaint and they

say that they have no information as to the truth of the allegation contained in said paragraph that the said plaintiff is now the owner of said spirits stored in general bonded warehouse No. 1, Fifth District of Kentucky, operated by the Louisville Public Warehouse Company, the defendant herein.

They say that they have no information as to the truth of the allegation contained in paragraph 4 of the bill of complaint to the effect that on the 22nd day of April, 1920, the plaintiff directed the Louisville Public Warehouse Company to remove the distilled spirits referred to in the bill of complaint from its General Bonded Warehouse for the purpose of shipment of same in bond to General Bonded Warehouse No. 2 situated at Boston, Massachusetts, the proprietor of which is the Quincy Market and Cold Storage Warehouse Company; and they have no information as to the truth of the allegation therein contained that at the time of giving such directions to the Louisville Public Warehouse Company, the plaintiff made tender of all the charges and taxes legally due against said whiskey.

By way of answer to paragraph 7 of the bill of complaint, these defendants deny that the plaintiff is not now engaged in any occupation or business in the Commonwealth of Kentucky in or about or in connection with the whiskey described in the bill of complaint; and they deny that the plaintiff does not propose to do any business or make any sales of its whiskey in Kentucky. They say that it is true that there is a wastage by leakage and evaporation of distilled spirits in bond as alleged in paragraph 8 of the Bill of Complaint and that said wastage and leakage can only be stopped by bottling said liquor and that liquor cannot be bottled in bond under the law of the United States while contained in a general bonded



warehouse but they deny that before the said whiskey can be bottled in bond the 50 cents occupation tax provided for in the law which is attacked in the Bill of Complaint must be paid; but they say that so long as the liquor remains in bond in Kentucky, the tax asserted by the Commonwealth of Kentucky in the law attacked in the Bill of Complaint does not become due notwithstanding same may have been transferred from one bonded warehouse to another; and they deny that the plaintiffs cannot transfer the liquor referred to in the Bill of Complaint to a warehouse for bottling without paying the assessment of 50 cents per proof gallon provided for in the law attacked in the Bill of Complaint.

They deny that there is now in bonded warehouses elsewhere than in the State of Kentucky but within the United States distilled spirits known as whiskey in an amount exceeding 50 per cent of such spirits in bond in the United States and they deny that such spirits in bond are sufficient to supply all demands of the trade for which such spirits are saleable for a period of many years or for a period exceeding five years.

They say they have no information as to the truth of the allegation in said paragraph 8 in the Bill of Complaint that there is in the United States and outside of the State of Kentucky, one large distillery now operated for the manufacture of distilled spirits known as whiskey, nor have they information as to the proof of the allegation contained in said paragraph of the Bill of Complaint that other large distilleries located outside of the State of Kentucky but in the United States have declared their intention of and are preparing to engage in the manufacture of distilled spirits known as whiskey.

They have no information as to the truth of the allegation contained in said paragraph of the Bill of Com-

plaint that such alleged new production of distilled spirits known as whiskey will supply the demand therefor at a price far below the cost and carrying charges of the plaintiff upon its whiskey if the plaintiff's whiskey is subjected to the tax of 50 cents per proof gallon claimed by defendants herein on behalf of the Commonwealth of Kentucky.

The defendants deny that the price or value in bond of whiskey of the character in suit in this case is approximately \$1.00 per proof gallon or that such price varies from 70 cents to \$1.00 per proof gallon or that the plaintiff is in direct competition with others engaged in similar business in the sale of such distilled spirits known as whiskey at said price.

They have no information as to the truth of the allegation contained in paragraph 8 of the Bill of Complaint that there are large quantities of distilled spirits known as whiskey of Kentucky production in bond outside of the State of Kentucky with which distilled spirits plaintiffs' above described whiskey must come in competition for ultimate sale. They deny that for the defendants or the Commonwealth of Kentucky to levy or collect in the form of license tax or otherwise a tax at the rate of 50 cents per proof gallon upon plaintiff's distilled spirits known as whiskey, would be to destroy and confiscate the plaintiff's property or would result in depriving plaintiff of its property.

They disclaim any intention of claiming or attempting to claim from the plaintiff or from any other person affected by the provisions of this act a tax of 50 cents per proof gallon for each year the said liquor may be in storage but they state that the said law does not contemplate but one payment of the license tax of 50 cents per proof gallon, this to be paid when the liquor is released from

bond or transferred under bond out of the state; and the tax of 50 cents per proof gallon when so paid is full satisfaction of the license tax asserted by the Act in controversy regardless of the length of time the said liquor may have been manufactured or in storage.

Answering paragraph No. 9 of the Bill of Complaint, they deny that the assessment for the collection by any process of means of a license tax of 50 cents per proof gallon upon plaintiff's distilled spirits, known as whiskey, would be taking plaintiff's property or depriving plaintiff of its property without due process of law or would deny the plaintiff the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States.

They deny that the said license tax or the accompanying lien created upon plaintiff's property by reason of said tax violates the Thirteenth or the Fourteenth Section of the Bill of Rights of the Constitution of Kentucky or that as a license tax, it is so enormous or confiscatory upon the business or occupation of owning and storing whiskey in bond, that it is prohibitive or a useful or legitimate occupation or destructive thereof, or that it is invalid under the constitution of the State of Kentucky or that the said tax or the Act attempting to create said tax, are in violation of the tax provision of the Constitution of the State of Kentucky or that same is void.

They deny that unless restrained and enjoined by this court, the defendants herein, or that the defendant, the Louisville Public Warehouse Company, will engage in a multiplicity of suits involving plaintiff's property for the penalties continually accruing or to accrue for the violation of the Act aforesaid or that plaintiff, or plaintiff's property, will be subjected to a multiplicity of suits,

lines or liabilities against which plaintiff will have no adequate remedy at law or any remedy at law for the protection of plaintiff's rights or the preservation or enjoyment of its property aforesaid.

They deny that plaintiff has no adequate remedy at law.

They deny that plaintiff will be subjected to great or irreparable injury or any injury unless this Court should interfere by injunctive process to restrain the enforcement or collection of said claim for taxes or penalties.

Therefore, premises considered, defendants ask that the plaintiff take nothing by its petition, and further pray for their costs and all proper and equitable relief.

CHARLES I. DAWSON,



*Attorney.*

Affiant, Charles I. Dawson, states that he is the Charles I. Dawson mentioned in and made a party defendant to the Bill of Complaint in this cause and that he believes the statements of the foregoing Answer are true.

CHARLES I. DAWSON.

Subscribed and sworn to before me by Charles I. Dawson, this 14th day of May, 1920.

LILLIAN G. DAVIS,

*Notary Public, Jefferson County, Ky.*

(SEAL)

My commission expires Aug. 6, 1923.

**Motion of Louisville Public Warehouse Company to Dismiss Bill—Filed May 14, 1920.**

Comes the defendant, Louisville Public Warehouse Company, by counsel and respectfully moves the Court to dismiss this bill of complaint because it states facts insufficient to constitute a valid cause of action in equity.

WM. OVERTON HARRIS,

*Attg. for Louisville Pub. Warehouse.*

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**Affidavit of J. P. Meehan—Filed May 14, 1920.**

Affiant, J. P. MEEHAN, states that he is now and was on and prior to the 16th day of January, 1920, and has been at all dates since said time, the agent in charge of the office of the American Railway Express Company at Frankfort, Kentucky, said express Company being a common carrier engaged in hauling and carrying freight for hire.

He states that there are in Frankfort five distillery bonded warehouses, wherein there is stored whiskey; that under the law he is required to keep a record in his office of each shipment of intoxicating liquors known as whiskey made through his office over the line of the American Railway Express Company; that said record must show the date of shipment, the quantity of whiskey so shipped, the name of the consignor and his address, the name of the consignee and his address, and also the number of the government permit authorizing the sale and shipment of said whiskey.

He states that from the 16th day of January, 1920, up to and including the 31st day of January, 1920, there were

shipped upon Federal sale permits from Frankfort, Kentucky, and through the office of the American Railway Express Company, a total of 134 cases of whiskey, and of 16 barrels of whiskey, making a total in all of 1037.27 gallons shipped through the said office for said month; that his records show that for the month of February, 1920, there were shipped under Federal sale permits through the said office over the lines of the American Railway Express Company 1333 cases of whiskey, and 321 barrels of whiskey, making a total for said month of 16626.04 gallons; that for the month of March, 1920, up to and including the 11th day of March, 1920, his records show that there were shipped through his office from Frankfort, Kentucky, under Federal sale permits 494 cases of whiskey and 156 barrels of whiskey, making a total of shipments in March up to and including March 11th, of 7587.53 gallons; that from the 12th day of March, 1920, which was the first day upon which the fifty cent license tax imposed by the last session of the General Assembly became effective, up to and including the 31st day of March, 1920, there were shipped through his office upon Federal sale permits 1610 cases and 227 barrels of whiskey, or a total for said last named period of 14209.41 gallons; that for the month of April, 1920, his records show that there were shipped through his office upon Federal sale permits 6333 cases and 202 barrels of whiskey, making a total for said month of 25658.37 gallons; that for the month of May, up to and including the 12th day of May, the records in his office show that there were shipped through said office upon Federal sale permits 2170 cases and 196 barrels of whiskey, or a total for said last named period of 14805.41 gallons.

That of all the quantity of whiskey shipped during the period above referred to through the office of the

American Railway Express Company at Frankfort, Kentucky, only two very small shipments were shipped to Kentucky; that the balance of said whiskey was shipped to various parts of the United States, some going to Massachusetts, some to Illinois, some to New York, some to Pennsylvania, some to Wisconsin, some to New Jersey, some to Missouri, some to Ohio, some to Texas and some to Kansas, the bulk of same, however, going to New York, Illinois, Pennsylvania and Ohio, the respective quantities being in the order of the last States named.

He states that the quantity shipped for April, 1920, is considerably smaller than it would have been but for the fact that from the 13th till the 22nd day of April there was an absolute embargo on whiskey shipments, and he was compelled to and did refuse application for shipment of a great deal of whiskey during said period of time.

He states that since the 12th day of March, 1920, the quantity of whiskey being shipped through his office was in excess of shipments for any corresponding period of the year 1919, except for the month of June, 1919.

He further states that his office is located near to the freight office of the Railroad Company passing through Frankfort, and that he has opportunity to and has observed shipments of whiskey made through the freight office, and he knows it to be a fact that large quantities of whiskey have been shipped during the period covered and referred to in this affidavit, by freight; however, the amount of same he is unable to state.

He states that a great deal of the whiskey referred to in this affidavit as being shipped through his office was shipped in carload lots, the express car being placed at the loading point of the respective distilleries, and this affiant would in many instances be in charge of the car

while same was being loaded. In this way he was in a position to observe and know something of the magnitude of business being conducted by the distilleries, in addition to that passing through his office; and he says that during the period referred to in this affidavit he believes it to be true that large quantities of whiskey have been shipped from the distilleries at Frankfort by truck to points out of the State and that to him it appears that the problem has been, not to find a market for the whiskey but to find adequate means of transporting same to the market.

J. P. MEEHAN.

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**Affidavit of P. H. Leatherwood—Filed May 14, 1920.**

The affiant, P. H. LEATHERWOOD, states that he is now and has been since August 22nd, 1919, the regularly appointed and acting express agent for the American Railway Express Company in Maysville, Kentucky.

The states that all liquor shipments by express from and through the Maysville Express Office from March 11th to May 8th, inclusive, of this year has been made by the two local distillors, J. H. Rogers & Co. and H. E. Pogue Distillery Co. and consigned to points outside of the State of Kentucky. He states such shipments, during said time, aggregate Six Thousand and Ninety-two gallons (6092) of whisky as shown by the records of his office in his charge, possession, custody and control which he knows to be absolutely correct as shown by a true itemized copy of which giving amount of each shipment, consignor and consignee, when and where and to whom shipped attached hereto, and made a part of this affidavit.



He states that the complete record of liquor shipments from the Maysville Express Office from March 11th to May 8th, 1920, follows;

3/11/20	J. H. Rogers & Co. to Federal Dis't Co., Cincinnati, O.	(Gals.) 168
3/20/20	J. H. Rogers & Co. to Green Bros., Fairhaven, Vt.	38
3/24/20	H. E. Pogue Dist. Co. to Kettler Drug Co., Milwaukee, Wis.	35
3/24/20	J. H. Rogers & Co. to C. H. Magruder, New Orleans.	47
3/30/20	H. E. Pogue Dist. Co. to Patrick Flinn, New Haven, Conn.	622
3/30/20	J. H. Rogers & Co. to J. H. Terrell, St. Paul, Minn.	82
3/30/20	J. H. Rogers & Co. to M. B. Caslin, New Orleans, La.	37
4/24/20	J. H. Rogers & Co. to Jno. Daugherty, Philadelphia, Penn.	376
4/26/20	H. E. Pogue Dist. Co. to Patrick Flynn, New Haven, Conn.	812
4/26/20	H. E. Pogue Dist. Co. to Daniel Leechman, Chicago, Ill.	405
4/27/20	J. H. Rogers & Co. to E. W. Hefferman, Pottsville, Penn.	374
4/28/20	H. E. Pogue Dist. Co. to Yahr & Lange D. C., Milwaukee, W.	696
5/ 8/20	H. E. Pogue Dist. Co. to L. L. Bolline, New York.	1200
5/ 8/20	J. H. Rogers & Co. to L. L. Bolline, New York.	1200

Affiant further states that he has no interest whatever in the above styled action and did not know that same was pending until today when requested to make a sworn statement or affidavit setting out the facts as shown by the records of his office of whisky shipments forwarded by express of Maysville, Kentucky, at and from the dates aforesaid. He states that there has not been any shipments by express from the Maysville Office, during the period mentioned, to any point within the State of Kentucky.

B. H. LEATHERWOOD.

#### Affidavit of William Dunn—Filed May 14, 1920.

The affiant, WILLIAM DUNN, states that he is a member of the firm, trading and doing business under the firm name and style, Will Dunn Drug Co., of Lexington, Ky.

Affiant says that he is a registered pharmacist as well as a druggist, and that he has duly qualified and is au-

thorized to sell whiskey for medicinal purposes only and to compound medicines in which whiskey is one of the ingredients on the prescription of a regular licensed physician who has qualified under the Federal law to write such prescriptions. Affiant says that he is familiar with the current market price of Kentucky Whiskey for all times since March 16, 1920; that his knowledge is based upon purchases he has made as well as market quotations made by the wholesale dealers. Affiant says that his firm has paid for the whiskey which it has used in its business since March 16, 1920, \$25.00 per case for pints bottled in bond Kentucky whiskey. He says that the market price, based upon market quotations and prices made by wholesale dealers direct to his house since March 16, 1920, has been from \$20.00 to \$30.00 for pints bottled in bond Kentucky whiskey, based on the age, quality and proof of the goods offered. He says that the price which he has paid and the quotation above referred to included all charges for government taxes, state taxes, storage and clearance charges. He says that the character of goods which is required for use in his business has at all times since March 16, 1920, maintained an average price of \$24.00 per case for pint bottled in bond.

W. W. DUNN.

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**Affidavit of W. W. Wikoff**—Filed May 14, 1920.

The affiant, W. W. WIKOFF, states that he is now and for the last past thirty years has been freight agent for the Chesapeake and Ohio Railway Company at Maysville, Kentucky, and that as such he has had charge of and generally supervised all freight shipments, forwarded by freight, from the Maysville Freight Station.

He states that there is now two distillerys near the City of Maysville in Mason County, and that Maysville is the chief shipping point of both concerns. He states that during the period embraced from March 12th last, to date, there has been shipped by freight from Maysville, Two Thousand Seven Hundred and Twenty (2720) gallons of whisky. He states that from the records in his office that there has been, during said time, the following shipments of whisky:

March 27, 1920, H. E. Pogue Dist. Co. shipped 444 cases of whisky of 1667 gallons consigned to Daniel Lichterman, Chicago, Ill., April 5th, 1920, J. H. Rogers & Co. made shipment of 170 gallons of whisky consigned to Federal Distributing Co., Cincinnati, O. April 20, 1920, H. E. Pogue Dist. Co. shipped by freight 295 cases of whisky or 885 gallons consigned to Federal Distributing Co., Cincinnati, Ohio.

Affiant further states that the record of shipments in his office shows the shipments aforesaid, and he attaches hereto a copy of said record which is true.

W. W. WIKOFF.

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UNITED STATES RAILROAD ADMINISTRATION  
W. G. McADOO, Director General of Railroads.

CHESAPEAKE AND OHIO RAILROAD.

Maysville, Ky., May 13, 1920.

Ass't General Attorney,  
State of Kentucky,  
Frankfort, Ky.

Dear Sir:

The following are shipments of whiskey made from this station since March 12th, 1920:

444 cases of whiskey 1666 proof gallons, made by H. E.

Pogue Distilling Company March 27th, consigned to Daniel Lichterman, Chicago, Ill.

Shipment of 170 wine gallons, 169.69 gallons, 5 barrels of whiskey on April 5th from J. H. Rogers and Company, consigned Federal Distributing Company, Cincinnati, Ohio;

and on April 20th, 295 cases of whiskey, 885 wine gallons, 885 proof gallons, from H. E. Pogue Distilling Company, consigned to Federal Distillery Company, Cincinnati, Ohio.

Yours very truly,

W. W. WIKOFF,  
*Agent.*

WWW: FM

Total No. of gallons 2720.69/100.

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**Affidavit of Harry A. Wiechelman**—Filed May 14, 1920.

The affiant, HARRY A. WIECHELMAN, first being duly sworn, on oath, says:

I am a resident and citizen of the City of Covington, Kentucky, and am engaged in the business of druggist and pharmacist, and have secured and possess proper permits to vend whiskey for medicinal use. I am familiar with the current market price of Kentucky Bourbon whiskey. This price is and was during the month of April, 1920, six dollars per gallon for whiskey in bulk, and affiant says that he paid this price for a barrel of Kentucky whiskey during said month containing about 43.4 gallons. Affiant says that this price which he paid included all charges for Government taxes, storage, clearance and State taxes, and further that this is the character of goods he sells upon authorized prescriptions for medicinal purposes, and that he paid the prices set out above for same.

H. A. WIECHELMAN.

W. L. WELLER & SONS.

126 W. Main Street

Louisville, Ky.

May 5th, 1920.

Dear Sir:

We have on hand three or four hundred cases Mammoth Cave Bottled in Bond Pints, and as we understand you have a permit to dispense whiskies as such on doctor's prescriptions, we take pleasure in quoting you these goods as follows:

Mammoth Cave Pts. B in B \$23.50 per case.  
net cash, express prepaid, and we are in position to make prompt shipments.

However, the demand for whiskey as medicine is constantly growing as more druggists are taking out permits almost daily and as there is about fifty million gallons of all kinds of distilled spirits in bond at this time, and no more being made, the price we think will continue to advance steadily, therefore, we quote prices for prompt acceptance only.

You will bear in mind that there are about one hundred and fifty million gallons of distilled Spirits used in the United States in normal times per year and you will readily appreciate that these fifty million gallons are not going to last long, and naturally the price will advance.

We also have some fine Brandy and Gin on hand and Pure Blackberry Wine, and if you are interested in these goods we will be glad to quote you prices.

Yours truly,

W. L. WELLER & SONS.

JOHN D. PARK & SONS CO., LTD.  
MEDICINAL LIQUOR DEPARTMENT  
WHOLESALE PROPRIETARY MEDICINES  
CHEMICALS, DRUGS, ETC.

603 Mercantile Library Building.

CINCINNATI, O.

May 10, 1920.

The Frankfort Drug Co.,  
Frankfort, Ky.

Gentlemen:

Replying to yours of the 7th, advise we can furnish Old Taylor bottled in bond quarts at \$23.00, pints \$23.50 in 25 case lots. In less than 25 case lots our price is \$25.00 per case.

We can furnish Frankfort Bourbon, 4 years old, in bulk, at \$6.00 per gallon, including all taxes and charges. Old Taylor in bulk at \$6.00 per gallon.

Very truly yours,

JOHN D. PARK & SONS CO., Limited,  
Medicinal Liquor Dept.,

By

SF;H

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**Affidavit of Mason Brown**—Filed May 14, 1920.

The affiant, MASON BROWN, states that he is a druggist engaged in the business in Frankfort, Kentucky, and has been for several years, and that he is authorized under Federal permit to sell liquor on prescriptions of physicians and he is now engaged in such business.

He states that he is familiar with the prices charged by brokers and dealers in liquor to the drug store trade over the country for medicinal purposes. He files herewith a quotation from John D. Parks & Sons, of Cincinnati, Ohio, under date of May tenth, quoting prices on

whiskey for medicinal purposes and also price list of W. L. Weller & Sons, of Louisville, Kentucky, dated May fifth, 1920, quoting prices on liquor for medicinal purposes and he says that the prices quoted therein represent about a fair average prevailing price charged by brokers and liquor dealers for whiskey when sold to drug stores for medicinal purposes. Said two quotations are marked "Exhibit A" and "Exhibit B" respectively.

MASON O. BROWN.

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**Affidavit of O. A. Boeckley**—Filed May 14, 1920.

The affiant, O. A. BOECKLEY, first being duly sworn, on oath, says:

I am a resident and citizen of the City of Covington, Kentucky, and am engaged in the business of druggist and pharmacist, and have secured and possess proper permit to vend whiskey for medicinal use. Affiant says that he is familiar with the current price of Kentucky Bourbon whiskey, and that this price is and has been since about the first of March, 1920, six dollars per gallon for whiskey in bulk, and affiant says that he purchased during this time a barrel of Kentucky whiskey at this price per gallon. Affiant says that this price which he paid per gallon for said whiskey included all charges for Government taxes, storage, clearance charges and State taxes, and further that this is the character of goods he sells upon authorized prescriptions for medicinal purposes, and that he paid the prices set out above for same.

O. A. BOECKLEY.

**Affidavit of J. P. Tarbeck**—Filed May 14, 1920.

The affiant, J. P. TARBECK, first being duly sworn on oath, says:

I am a resident of the City of Lexington, Kentucky, and am a regularly licensed druggist and pharmacist, and have secured and possessed proper permits to vend whiskey for medicinal use. Affiant says that he is familiar with the current market price of Kentucky Bourbon Whiskey and this price is and has been since March 16th, 1920, from \$22.50 to \$25.00 per case for pints bottled in bond.

Affiant says that he has had quotations from W. L. Weller & Sons of Louisville, Ky., and from Alfred Vogeler Drug Co. of Cincinnati, O., and other wholesale dealers since March 16th, 1920, and that the lowest price quoted him per case in pints for bottled in bond Kentucky Whiskey was a quotation made by W. L. Weller & Sons at \$22.50 per case. He says that Alfred Vogeler Drug Company of Cincinnati, O. made him a quotation on yesterday of \$24.00 per case for said whiskey. Affiant says that the price which he paid and the above quotation were made upon the basis of all charges, including taxes, storage, clearance charges should be paid by the seller.

J. P. TARBECK.



**Affidavit of C. M. Fisher**—Filed May 14, 1920.

The affiant, C. M. FISHER, states on oath that he is the General Agent of the American Railway Express Co. for Louisville, Jefferson Co., Kentucky, and that he has a record in his office showing the shipments of whiskey from his office, and that from said records there has been delivered to said Express Company for shipment, 12112 cases and 1204 barrels of whiskey from and including the 12th day of March, 1920, up to and including the 12th day of May, 1920.

Affiant says that all of the above said whiskey was shipped out of the State of Kentucky by the consignors, except 6 barrels and 83 cases, which were shipped to points in Kentucky.

Affiant says that the above appears from the records in his office, and constitutes all the shipments of whiskey from his office.

Signed: C. M. FISHER.

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**Affidavit of C. E. McCarthy**—Filed May 14, 1920.

The affiant, C. E. MCCARTHY, states that he is a member of the firm of Hayes & McCarthy, retail druggists of the City of Lexington, Kentucky, and as such druggist is duly and regularly licensed to purchase and sell whisky by prescription for medicinal purposes.

The affiant states that he has recently received quotations from wholesale whisky concerns on prices for whisky to be used by him in his said business; that on the 6th day of May, 1920, he received a quotation from W. L. Weller & Sons, of Louisville, Kentucky, quoting Mammoth Cave Whisky in pints, bottled in bond, at \$23.50 per

case, and the affiant files herewith and makes a part hereof the said quotation, marked for identification Exhibit "A."

The affiant further states that on May 10, 1920, he received from Jno. D. Park & Sons Co., of Cincinnati, Ohio, the following quotations on, bottled in bond, pints of Old Taylor and Bond & Lillard:

50 case lots	\$22.00
25 case lots	23.00
10 case lots	24.00
5 case lots	25.00

and that this said concern further offered to furnish him in bulk Six Year Old Chicen Cock Whisky at \$6.00 per gallon, and the affiant files herewith and makes a part hereof the said quotation, marked for identification Exhibit "B."

C. E. MCCARTHY.

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W. L. WELLER & SONS.

126 W. Main Street

Louisville, Ky.

May 6th, 1920.

Dear Sir:

We have on hand three or four hundred cases Mammoth Cave Bottled in Bond Pints, and as we understand you have a permit to dispense whiskies as such on doctor's prescriptions, we take pleasure in quoting you these goods as follows:

Mammoth Cave Pints B in B \$23.50 per case net cash, express prepaid, and we are in position to make prompt shipments.

However, the demand for whiskey as medicine is constantly growing as more druggists are taking out permits almost daily, and as there is about fifty million gallons of all kinds of distilled spirits in bond at this time, and no more being made, the price we think will

continue to advance steadily, therefore, we quote prices for prompt acceptance only.

You will bear in mind that there are about one hundred and fifty million gallons of distilled spirits used in the United States in normal times per year and you will readily appreciate that these fifty million gallons are not going to last long, and naturally the price will advance.

We also have some fine Brandy and Gin on hand and Pure Blackberry Wine, and if you are interested in these goods we will be glad to quote you prices.

Yours truly,

W. L. WELLER & SONS.

Exhibit A

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JOHN D. PARK & SONS CO., LTD.  
MEDICINAL LIQUOR DEPARTMENT.  
603 Mercantile Library Building,

Cincinnati, O., May 10, 1920.

Hayes & McCarthy,  
309 W. Main St.,  
Lexington, Ky.  
Gentlemen:

In reply to your letter of the 7th, pleased to advise that we can furnish bottled in bond pints Old Taylor and Bend & Lillard, in

50 case lots at	\$22.00
25 case lots at	23.00
10 case lots at	24.00
5 case lots at	25.00

We can also furnish in bulk 6 year old Chickencock at \$6.00 per gallon.

Trusting to receive your order, we remain

Very truly yours,  
JOHN D. PARK & SONS Co., Limited,  
Liquor Dept.  
By

SF:H

**Affidavit of Robert A. Gordon**—Filed May 14, 1920.

The affiant, ROBERT A. GORDON, first being duly sworn, on oath, says:

I am a resident and citizen of the City of Covington, Kentucky, and am engaged in the business of druggist and pharmacist, and have secured and possess proper permits to vend whiskey for medicinal use. I am familiar with the current market price of Kentucky Bourbon whiskey. This price is and has been since about the first of March, 1920, at the rate of twenty-four (\$24.00) dollars per case, bottled in bond whiskey. This price includes all charges for Government tax, storage, bottling, clearance charges and State tax. Affiant further says that this is the character of goods he sells upon authorized prescriptions for medicinal purposes, and that he paid the price set out above for same.

Further affiant saith not.

ROBERT A. GORDON.

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**Order Filing Motion for Injunction, Motion to Dismiss Bill, Affidavits, and Submitting Motions**—Entered May 14, 1920.

This cause now coming on for hearing in this court before the Honorable Arthur C. Denison, a Circuit Judge for the Sixth Circuit, Honorable Walter Evans, Judge of the United States District Court for the Western District of Kentucky, and Honorable John E. Sater, Judge of the District Court of the United States for the Southern District of Ohio, on the motion of the plaintiff for an injunction *pendente lite*, the plaintiff appeared by Levi Cooke and Trabue, Doolan, Helm & Helm, its counsel,

and filed a copy of its motion for an interlocutory injunction entered here in April 29, 1920, duly served upon the defendants and also notice duly served of the time and place of hearing of said motion. The plaintiff also filed to be read upon said hearing the affidavit of James Thompson.

The defendant, Louisville Public Warehouse Company, appeared by Wm. Overton Harris, its counsel, and tendered a motion to dismiss the Bill of Complaint herein, which motion is ordered filed.

Defendants, John J. Craig, Auditor of the Commonwealth of Kentucky, and Charles I. Dawson, Attorney General for the Commonwealth of Kentucky, appeared by said Charles I. Dawson, Attorney General, and filed a motion to dismiss the Bill of Complaint herein and also a Plea in Abatement and Motion to stay proceedings and in support of same filed a certified copy of the record of the Franklin Circuit Court in the case now pending therein of S. Rosenbloom & Company v. E. H. Taylor, Jr. & Sons.

The Court directed that the hearing proceed both upon the motion this day filed and upon the motion for an injunction *pendente lite* and the defendants filed to be read upon the hearing of the motion for an injunction the affidavits of Wm. Dunn, John J. Craig, Robt. A. Gordon, J. P. Meehan, Mason Brown, Harry A. Wichelman, O. A. Doeckley, J. P. Tarbeck, Elwood Hamilton, C. E. McCarthy, C. M. Fisher, P. H. Leatherwood and W. W. Wickoff.

The defendants having announced that they were unable to proceed with the hearing without obtaining further testimony and there not being sufficient time to hear same orally, the Court directed that this cause be referred

to A. G. Ronald, Clerk of this Court, as Special Master, who was selected because of his experience and peculiar fitness therefor, to take the testimony offered by the parties and to file same on or before May 19, 1920. It is further ordered that this cause be submitted on all the said motions with leave to all parties to file briefs on or before May 19, 1920.

Approved for entry May 14, 1920.

A. C. DENISON,

*Circuit Judge.*

WALTER EVANS,

and

J. E. SATER,

*District Judges.*

**Testimony Taken Before Special Master—Filed  
May 19, 1920.**

The depositions of William J. Gorman, Alfred B. Flarsheim, Joseph E. Oppen, Marion E. Taylor, A. C. Thompson and D. L. Lally taken by consent before the Master, Mr. Allie Ronald, on the 15th day of May, 1920, at the Clerks office of the District Court of the United States for the Western District of Kentucky to be read as evidence for the defendants in the above styled action.

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Appearances:

For plaintiff: Mr. Levi Cooke and Mr. T. Kennedy Helm.

For defendants: Atty. Genl. Charles I. Dawson and Mr. W. T. Fowler.

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WILLIAM J. GORMAN, called for the defendants, being duly sworn by the Master and being interrogated by General Dawson, deposed as follows:

Q. Your name is William J. Gorman?

A. Yes, sir.

Q. State what business you are engaged in?

A. I am Secretary and Treasurer of W. A. Gaines & Company, Distillers of Frankfort, Kentucky.

Q. Were you in that occupation on and prior to the 12th day of March, 1920.

A. I was.

Q. How long have you been connected with the Company?

A. Since 1900.

Q. State whether or not you were acquainted with the prevailing market price prior to the 12th day of March, 1920, of Kentucky Bourbon whiskey, say of four years of age, in bond, in case of pints?

Mr. T. Kennedy Helm: I object to so much of this

question as says "bottled in bond" because the controversy here is as to whiskey in bulk and not bottled in bond. Whiskey bottled in bond is not whiskey in bond; it is free whiskey.

Q. You take whiskey from the bonded distillery warehouse and remove it to another warehouse for the purpose of bottling and you there bottle it in bond, do you not?

A. Yes, sir.

Q. So I ask you what the prevailing market price of four year old bourbon whiskey of the character you make was prior to the 12th day of March, 1920 when bottled in bond in pints?

Mr. T. Kennedy Helm: The plaintiff also objects to this question on the ground that the value of W. A. Gaines & Companys special brand with a great reputation is an entirely different thing from the market price of the whiskey in controversy in bulk.

The Master: The Master is of the opinion that the testimony should be limited to the value of whiskey of the same character and quality as that involved in the controversy in this action; but under the Equity Rules it seems to be the Master's duty to have all the testimony transcribed and reported to the court so that the Court may judge of its competency; and the objection is therefore overruled. The Master makes this statement because it will probably be applicable to other objections that may arise.

Mr. T. Kennedy Helm: We except to the ruling.

A. Do you mean in cases?

Q. Yes.

A. \$30.00 a case.

Q. That, of course, included all Government taxes, storage charges, interest and ad valorem taxes, did it not?

A. It included all of that.

Q. Was that price f. o. b. at the distillery?

A. Yes, sir.

Q. State what the market price of that same whiskey bottled in the same way now is?

A. Just following the application of the new fifty cent tax the price was first reduced to \$25 a case, then a few days later to \$22. a case and at the present time the price is \$21 a case, all on account of this fifty cent tax.

Q. Do you know whether your company has been



selling whiskey bottled in bond in case lots since the effective date of the fifty cent tax law in Kentucky?

A. Have they sold it since then?

Q. Yes.

A. Yes; they have sold a limited quantity.

Q. Do you know how much your company has sold since the 12th day of March, 1920?

A. Approximately probably 1000 cases.

Q. That is equivalent to 3,000 gallons is it not?

A. Yes, sir.

Q. Has that whiskey been sold to customers in Kentucky or outside of Kentucky?

A. Entirely to customers outside of Kentucky with the exception of two cases. All the rest was sold outside of the State.

Q. To what parts of the United States has the most of that whiskey been sent?

A. To the States of New York and Wisconsin.

Q. During the month of April from the 13th of April up to and including the 23rd of April, common carriers would not receive whiskey for shipment because of an embargo or strike?

A. The embargo was not on all of the railroads. There were exceptions where we could make shipments. And the embargo changed from time to time. We were able during the embargo period occasionally to ship whiskey to the States of New York and Wisconsin.

Q. Have you shipped whiskey since the effective date of this law into Pennsylvania?

A. We have.

Q. Pennsylvania has a considerable quantity on hand in that state?

A. I believe that is so.

Q. Are you selling or have you sold since the 12th day of March any warehouse receipts?

A. We have sold warehouse receipts.

Q. Since the 12th day of March?

A. Yes; since the 12th day of March.

Q. Are you able to state how much business you have done in this particular since the 12th day of March approximately.

A. We have probably sold five or six hundred barrels—warehouse receipts for five or six hundred barrels.

Q. That is approximately 2,000 or 2,500 gallons?

A. Yes, sir.

Q. State what price you obtain for those warehouse receipts?

A. We have sold whiskey since March 12 around one dollar per gallon and the highest was \$1.10 per gallon.

Q. How old was that whiskey?

A. Covering several seasons, some the Spring of 1913—most of it was Spring of 1913—seven year old whiskey.

Q. Those warehouse receipts, of course, were sold under the condition that the purchaser take care of the Government taxes the ad valorem taxes and this fifty cent tax?

A. Yes, sir.

Q. Your purchasers knew at the time, I suppose, and you explained to them this new fifty cent tax imposed by the law of Kentucky?

A. On those particular lots, but those holding warehouse receipts prior to that date would not have knowledge of that fact.

Q. During its distilling business, had your Company engaged in the practice of selling warehouse receipts from time to time as it placed its whiskey in its distillery bonded warehouse?

A. Yes.

Q. Prior to the enactment of this law where warehouse receipts were sold at the time the spirits were placed in the Distillery Bonded Warehouse, what price by the gallon did you get for those warehouse receipts?

A. Whiskey sold in that way—sold at the time of its manufacture, our selling price at the time on the Old Crow Bourbon was 65 cents per gallon, Old Crow Rye 75 cents per gallon, Hermitage Bourbon whiskey 60 cents per gallon, Hermitage Rye 70 per gallon and carrying charges from the date of entry into the warehouse.

Q. So that a person who purchased these warehouse receipts from your Distillery at the time of the manufacture of the whiskey which they represented, if he secured his whiskey at 65 cents a gallon had to stand, counting the fifty cents tax, now \$1.15?

A. Not exactly.

Mr. T. Kennedy Helm: If I understood the witness he is testifying that the sale of new whiskey when taken from the distiller and put into the distillery bonded warehouse was at 60 or 70 per gallon. The question of the Attorney General seems to presuppose that there were no

carrying charges running against that whiskey. I object to the question which presupposes that there were no carrying charges.

Gen. Dawson: I did not presuppose that at all.

The witness: I could not answer the question as put.

Q. So then exclusive of the carrying charges, when that whiskey is entered into bond, there is no way of telling at that time just what that whiskey will represent in cost to the man who tax pays it when he comes to tax pay it, even though he tax pays it two or three months or four or five years after it is entered?

A. To explain: When we are selling warehouse receipts now, we absorb all the charges from the date of the manufacture up to the present and make a price of so much per gallon, all charges paid to date which is vastly different from buying whiskey when originally made—the holding charges follow it.

Q. Do you mean to say that the prices you quoted a while ago of warehouse receipts negotiated as of this date covered all warehouse charges?

A. All warehouse charges. The only time we let those follow is where the man buys the whiskey at the time it was made, what we call "on contract." Subsequent to that, we have been absorbing all charges.

Q. Did you sell warehouse receipts at any time within a few months prior to the 12th day of March, 1920?

A. We did.

Q. What was your price for those warehouse receipts then?

A. Varying prices—we sold quite a lot at \$1.50.

Q. \$1.50?

A. Yes, we were selling at that.

Q. Take four year old whiskey of the character of whiskey manufactured by the Imperial Distillery Co. and which was manufactured, say in the year 1916, if you are familiar with that character of liquor, state what warehouse charges would be on that liquor up to this date approximately?

A. I have no knowledge of the warehouse charges made by the Imperial Distilling Co. In fact, I do not know anything about their warehouse charges.

Q. The charge of five cents per barrel per month is a general charge made by all distillery warehouse companies?

A. It was up to a year or two ago when the distillers

advanced their charges, some to ten cents and some to fifteen cents, so I heard.

Q. But in 1916 the prevailing price was everywhere five cents per barrel per month?

A. So far as I know.

Q. And at that time, the ad valorem tax assessment on liquor in Kentucky was everywhere—

A. \$21 per barrel.

Q. And the interest charges were practically the same everywhere, were they not?

A. No doubt.

Q. And the insurance charges practically the same everywhere?

A. There has been a vast change in the insurance rate but I don't know whether that prevailed as far back and 1916 but insurance on whiskey has increased greatly in value.

Q. By Mr. Cooke: Do you mean increased in value or that the cost of it has increased?

A. That is what I was speaking of, the premium.

Q. By Gen. Dawson: But it had not increased in May, 1916, had it?

A. I don't know whether it had just that far back or not, but possibly it may have been when the companies began increasing their rates.

Q. So that it is true that for the four year period running from 1916 the fixed warehouse charges were practically the same throughout Kentucky?

A. I rather think so.

Q. Now then, whiskey of the character manufactured by the Imperial Distilling Co. in the year 1916, what in your judgment would be a reasonable estimate of the warehouse charges on a gallon of whiskey?

A. For four years?

Q. Yes.

A. Probably one half a cent a gallon.

Q. One half a cent a gallon per year?

A. Yes, sir.

Q. You mean two cents a gallon for the four years?

A. It would be a half a cent a gallon for the four years.

Q. Then would you take into consideration the wastage on top of that?

A. That would not have anything to do with the warehouse charges. This amount we just mentioned

might be lost by the distiller by an accident to the barrel by which he would have to make good an excessive loss so that his storage account with a man is frequently a loss.

Q. To the distiller?

A. Yes, sir; it is not always a gain.

Q. The man who purchases warehouse receipts at the time the liquor is placed in the distillery bonded warehouse naturally at the end of the withdrawal period has sustained some loss by reason of the evaporation?

A. Yes, sir.

Q. What would that amount to on a gallon of whiskey?

A. It is hard to tell on a gallon. The Government provides a scale called the Carlisle Allowance that makes a given allowance for a given number of months which changes every three months about. It starts at one gallon and at the end of seven years it is 13½ gallons.

Q. Per what?

A. Per barrel.

Q. Were you acquainted or are you now acquainted with what the prevailing price of warehouse receipts was of the product of the Imperial Distilling Company in October, 1916?

A. I would not care to pass on that off-hand because I really do not know.

Q. Could you secure that information and give it to the stenographer?

A. I don't know that I could. I would have to make application to some broker and ask him if he had some old tables. We never try to keep track of competitive brands. Our whiskeys had a fixed selling value from the date of manufacture.

Q. Did the price of warehouse receipts increase in value after the date that the Federal Law became effective which prevented the manufacture of liquor during the war period?

A. After what date?

A. After the effective date of the Federal Law preventing the manufacture of distilled spirits.

A. You mean October 3rd, 1917?

Mr. Cooke: It became effective September 8th, 1917, under the Lever Act of August 10th, 1917, which was the War Time Prohibition under food control.

A. There was a falling off in value on that account.

Q. Why did not liquor increase in value before that time?

A. Most of those holding warehouse receipts were trying to sell them so that they could be tax-paid before the effective date of that Act. They were anxious to get out from under.

Q. Later on and before January 10th, 1920, did not liquor advance?

A. There might have been an advance of a few cents a gallon but I do not recall anything of any consequence during that period.

Q. What other warehouse charges or fixed charges besides what you have enumerated here would a purchaser of warehouse receipts which were bought in 1916 have to take care of now if he wanted to release his whiskey from Bond, other than the Government and the State license tax?

A. If he owned the warehouse receipts he would be carrying insurance I think in the whiskey bonded warehouse, since he owned the receipts—there would be that charge and the local taxes, state, county and city, in the location in which the warehouse was which contained the whiskey. He would have to pay all of that in addition to the State's ad valorem tax.

Q. Do you know that the taxes in Jefferson County on liquor amounted to approximately per gallon per year since 1916?

A. The carrying charges exclusive of the Government tax and the State's 50 cent tax?

Q. Yes.

A. Probably one-half of a cent a gallon per month or about six cents a gallon per year.

Q. You mean that covers the amount of the tax here?

A. Yes, sir; the county and State tax—the ad valorem State tax and interest figured at six per cent.

Q. What I am trying to get at is figuring the State tax, the ad valorem tax that the man would pay on his liquor that he had in Bond represented by warehouse receipts, what would he pay in the way of county taxes on the same liquor, what would he pay in the way of insurance charges on the same liquor and what would he pay in the way of interest charges on the same liquor—what would that amount to per gallon per year as a whole?

A. About six cents.

Q. Six cents per gallon per year?

A. Yes, sir.

Q. By Mr. T. Kennedy Helm: Do you include the interest charges?

A. Not compound.

Q. By General Dawson: That would include interest on the cost of his investment?

A. His original investment. By the way, I might qualify that by saying that is really based on the old five cents per barrel storage charge and the old tax rate and the old rate of insurance and not the present rates of insurance. I want to make that explanation.

Q. If it were based on the present warehouse storage charge and the present insurance rate, what would it amount to?

A. It is pretty hard to say. The insurance some place for instance is four times as much as it is others. Insurance companies have gotten to the point where they almost make a special rate for every building in which whiskey is stored with regard rather to its hazard, the general hazard, which was not so closely followed up prior to the advent of prohibition.

Q. But presuming on the general average, what would it amount to per gallon per year at the new rates?

A. I am not prepared to say because our buildings are all brick and metal roof and automatic sprinklers and we get what they call the lowest rate so that we have had no occasion to investigate the higher rates except to hear our competitors say they have been forced to pay vastly increased insurance rates.

Q. Are you acquainted with the character of the bonded warehouse that the Louisville Public Warehouse Company owns?

A. The general character of it. It is what is known as a general bonded warehouse under Government regulations, a warehouse where whiskey can be transferred from its original location and maintain its status on the government record.

Q. It is such a building as would carry a low rate?

A. That would depend on the location of the bonded warehouse. There is one in Covington which comes to my mind which was formerly a distillery bonded warehouse and I was told that that is far from being a desirable place to have whiskey stored in bond.

Q. Are you acquainted with the General Bonded

Warehouse No. 1, Fifth District of Kentucky, owned by the Louisville Public Warehouse Company?

A. I am acquainted with it just in a general way. None of our whiskey has ever been transferred to that warehouse by our company.

Q. From your observation is that a good hazard as an insurance proposition?

A. I would think so, being within the city limits.

Q. Are you acquainted with the Distillery Bonded Warehouse maintained by the Imperial Distilling Co.?

A. I am not.

Q. Explain how a man who owns warehouse receipts evidencing the title to liquor stored in a distillery bonded warehouse goes about bottling that liquor in bond?

A. You mean under the present prohibition law?

Q. Yes.

A. The owner of the warehouse receipt cannot bottle that whiskey in bond unless he obtains first a permit from the United States Government to sell liquor and after he obtains that permit he would have to send to the distiller copies of the Government Bond 1410 accompanied by instructions to bottle the whiskey in bond for him. The Distiller could not recognize the order unless 1410 accompanies the order.

Q. What would be the next step?

A. The next step would be for the distiller to make application to the United States Government to regauge the whiskey for bottling purposes. He would then pay the Revenue Collector of the District for the revenue stamps that would have to be placed on the barrels and the whiskey would then become tax-paid as the check for taxes would have to go to the Collector with the application. After the whiskey has been tax-paid, it is moved to a bonded bottling house and there dumped into tanks and drawn off into bottles. After being drawn off into bottles each bottle is sealed with a Government stamp over the cork and those bottles are placed in a place especially prepared for that purpose and both bottles and boxes stamped and they are then removed from the bottling house under the supervision of the Government storekeeper in charge.

Q. Are you acquainted with the present cost, independent of taxes and warehouse charges and of the cost of the liquor itself of bottling in bond a case of whiskey in pints per case?



A. With the present labor cost and one thing and another, I would think it would be in the neighborhood of \$4.00.

Q. Per case?

A. Yes, sir.

Q. And a case contains how much?

A. Three gallons.

Q. Did your business in liquor increase in February over what it was in January, 1920?

A. I am not prepared to say just exactly what happened. It has been very light for some time. I don't know that it has increased—I would think January and February were about the same.

Q. Did your business increase in March over February?

A. During the month of March there were a few more druggists began selling in different parts of the country what they had purchased on the market but most of them had purchased several months back. They began to send them in and make inquiries about how to tax-pay whiskey. Prior to that they had whiskey bottled in bond but they began at this time to make inquiries about tax-paying in barrels.

Q. Has it increased in April over what it was in March?

A. I cannot say it has. We had a slight increase in New York but a very perceptible falling off at all other points.

Q. Have you been bottling in bond whiskey since the 12th day of March on purchases from wholesale liquor dealers and brokers?

A. The only whiskey we have bottled in bond since the 12th of March was whiskey of which we were the owners and which we contemplated selling to druggists. We haven't bottled for any customer.

Q. You have been shipping since the 12th of March?

A. Principally barrel trade, very few cases.

Q. Has it been going to wholesalers?

A. Some wholesalers but mostly to druggists.

Q. It is a fact, is it not, that the number of druggists securing permits to handle liquor on prescription has been constantly increasing since the passage of this law?

A. Hardly so. Outside of the State of New York, our travelingmen have been endeavoring to induce them

to do that but our traveling men write us that the druggists are disinclined to do so in view of the stringent restrictions and the reports they have to keep. Our Western representative has not been able to do anything at all.

Q. Do you know what was the name of the brand of whiskey manufactured by the Imperial Distilling Co.?

A. I do not.

Q. When did this advance in the selling price of your liquor up to \$1.50 per gallon occur?

A. That was not an actual advance. It was the price we were trying to get during the period when not much was going on. Whiskey really has had no fixed value for some time. Some of the higher priced whiskeys have been selling lower than some whiskeys that were originally called "trash" whiskeys.

Q. You got this price of \$1.50 notwithstanding the fact that you had quite a quantity of liquor that you wanted to dispose of?

A. We considered that we got the price for the reason that we had a very old established brand and possibly people wanted to get hold of some of it before it was entirely out.

Cross-examined by Mr. T. Kennedy Helm:

Q. Did I understand you to say that the value of whiskey when sold through the sale of warehouse receipts was at this time approximately one dollar per gallon?

A. At the present time, that is what I said.

Q. What was the value on the 10th of March or just before the passage of this Act?

A. \$1.50.

Q. If whiskey is located outside of Kentucky in a bonded warehouse, will it sell higher than whiskey located in Kentucky in a bonded warehouse?

A. That has been very evident since March 12th both as shown by the quotation of leading brokers and by correspondence that we have had with some of our customers, calling our attention to it.

Q. In other words, if the owner of warehouse receipts in Kentucky re-sells his warehouse receipts he has to deduct apparently the fifty cents per gallon in competition with whiskey located outside of Kentucky?

A. Yes; exactly right.

Q. Assuming that whiskey is manufactured and is

placed in a distillery bonded warehouse, with warehouse receipts, what was the current market price, in the Spring of 1916 when sold?

A. 1916—I am not prepared to say that.

Q. Your Old Crow brand was 60 cents for Bourbon and 70 cents for Rye?

A. That was Hermitage. The Old Crow was 65 cents and 75 cents.

Q. That was for new whiskey?

A. New whiskey the day it was made, with all the carrying charges following.

Q. Those whiskeys you have mentioned because of the well established brand, Old Crow and Hermitage, have uniformly sold higher than ordinary whiskey or what you call trash whiskey?

A. Invariably, uniformly, continually.

Q. The current price of new whiskey in the Spring of 1916 and in the Fall of 1916 was say 50 to 60 cents per gallon and the purchase of that whiskey up to this time would be out of his money practically four years?

A. Yes, sir.

Q. So that his interest charges amounts to 12 or 14 cents per gallon?

A. In four years it would amount to 24 cents a gallon, six cents a year.

Q. In addition to the cost price?

A. Yes, sir.

Q. And in addition to that he would have to pay the taxes—or would he?

A. He would have to allow for all the ad valorem taxes and the storage charges—he would have to make some arrangement with his purchaser about this new 50 cent tax which is a new proposition. Probably he would have to absorb that or a man in another state would make the sale. There is no question about that.

Q. Louisville taxes are variable, city and county taxes, from year to year?

A. Yes, sir.

Q. Insurance rates are variable according to the particular building in which the whiskey is located?

A. That is right.

Q. All of those things will have to be taken into consideration when you give the price originally of a proof gallon on the sale of the original warehouse receipts?

A. Yes, sir.

Q. Can you give any idea of the approximate net profit to the owner of a warehouse receipt if he undertakes to sell whiskey four years old and which costs him 60 cents a gallon?

A. I don't think there would be any possible way for him to be entirely reimbursed.

Q. That is not counting the 50 cent tax?

A. Irrespective of that.

Q. I want to show you what purports to be an official form of the State of Kentucky for the report of distilled spirits by a warehouse and ask you if you are familiar with that form?

A. I am.

Q. That form correctly states the valuation placed by the State Board of Valuation and Assessment during its existence and later by the State Tax Commission on whiskey per barrel in Kentucky for all purposes, state, county and city, as a mere matter of valuation.

A. This report shows such valuation to be as follows:

1911, \$10 per barrel.

1912, \$12 per barrel.

1913, \$12 per barrel.

1914, \$12 per barrel.

1915, \$12 per barrel.

1916, \$12 per barrel.

1917, \$21 per barrel.

1918, \$25 per barrel.

1919, \$25 per barrel.

These valuations to my certain knowledge are correct and were fixed by the Board of Valuation on whiskey as of each one of these years.

Q. Whiskey in Bond?

A. Whiskey in Bond in Kentucky.

Q. That is for the ad valorem tax by State, City and County, is it not?

A. That is for valuation by State, City and County.

Q. And the rates for the respective jurisdictions vary except as to the State rate.

A. Exactly so.

Q. This report requires all warehousemen to make it and this valuation alone and the State rate alone shows the amount of the ad valorem tax of the State together with the added interest that the State of Kentucky could not collect until this whiskey was tax-paid to the Federal Government?

A. That is right.

Q. The County, City, Road and School taxes are not included on this report?

A. That is right.

Q. In addition to those taxes this report also requires the warehouse men to show the number of gallons withdrawn after the effective date of the two cents per gallon production tax on distillers, does it not?

A. With each payment of taxes that special two cent per gallon tax is paid independently of the ad valorem figures. It has to be paid in addition to that.

Q. That was under the Act of 1917 which started the two cent whiskey production tax?

A. That is right. I might add that in some counties additional road taxes add greatly to the burden of taxation.

Q. Will you please identify this official form of the State of Kentucky and file it with your deposition?

A. I identify this report and file it as "Exhibit Gorman No. 1."

Re-examined by General Dawson:

Q. You know, as a matter of fact, that the two cents license tax referred to in your testimony was not an annual accruing charge and carried no interest charges and was payable only on removal or transfer under bond?

A. That is true for the reason that we have been paying that tax each four months ever since it was assessed, and, therefore, there was no possibility of accumulation. That has been paid right along since it first became a law.

Q. And was paid as it was removed from the bonded warehouse.

A. It was paid every four months. We made this report every four months and we always paid the taxes to the State, County and City every four months and on all the other items except the two cent tax the back interest was charged for the reason that those charges are not collectable until the withdrawal of the whiskey.

Q. But my question is you paid the two cent tax only once and then only on the quantity of whiskey withdrawn up to the date of your report?

A. That is right.

Q. You are not selling warehouse receipts to any druggist at \$1.00 per gallon, are you?

A. No, sir; we havent sold any directly to druggists at that price.

Q. Dont you know the prevailing price of warehouse receipts to druggists who are the main consumers and who constitute the main market for whiskey now has been since this law became effective on March 12th has been \$1.50 to \$1.65 per gallon.

A. I know positively that is not a fact with regard to the only druggist I spoke to on the subject. He told me he would buy all the whiskey he wanted at 80 cents a gallon.

Q. Have you seen the reports that the various brokers and liquor dealers are sending out with quotations as to what they are selling these warehouse receipts at?

A. Here is a card of Friedman-Richard, May 11th, the only one I have noticed lately and which reached our office a few days ago. That firm of Friedmann-Richard bought a lot of Old Crow-Rye at \$1.15 a short time ago.

Q. I will ask you to file that card as part of your testimony marked "Exhibit Gorman No. 2."

Recross-examined by Mr. T. Kennedy Helm:

Q. The first quotation of \$1.50 per gallon is on Farmdale Rye, 1917?

A. Yes, sir.

Q. Do you know where Farmdale Rye is made?

A. No, sir.

Q. Is it not true that for years Eastern Rye whiskey has sold higher than Kentucky or Bourbon Whiskey?

A. Yes, sir.

Q. The next quotation is \$1.40 per gallon on Kickapoo stored in Illinois, Illinois production?

A. That is what it says there. I am not familiar with that.

Q. Is this in a bonded warehouse?

A. It is all bonded warehouse.

Q. It is labeled "Illinois \$1.40"?

A. Yes, sir. Those prices seem to go about 50 cents higher than Kentucky.

Q. Then this Jack Beam is a Kentucky whiskey?

A. Yes, sir.

Q. J. H. Beam of Nelson County?

A. Yes, sir.

Q. Is that Old Tub?

A. I dont know.

Q. That is one of the old brands?

A. An old brand.

Q. Quoted at \$1.25?

A. Yes, sir; and it generally supposed that you can buy whiskey for less than it is quoted by brokers.

General Dawson: We object to suppositions.

The Witness: It is a fact.

Q. By Mr. Helm: I want to show you a card of this same Freedman-Richard, Commission Merchants of Cincinnati, Ohio of date May 4th, 1920, and I ask you to identify that card and file it as a part of your deposition as Gorman No. 3 which shows some higher prices for Rye whiskey and I ask you if on that card they do not quote as the only Kentucky whiskey Indian Hill at 95 cents a gallon in Bond?

A. The only Kentucky bourbon, do you mean?

Q. Yes.

A. Yes, that seems to be the case. I believe the Everglade and others mentioned are all Rye whiskeys. I file this card as "Exhibit Gorman No. 3."

Q. Is it or not true that there are many factors which enter into the final sale of whiskey governed by the ordinary rule of supply and demand, the location of the goods, the desire of the purchaser for a particular brand and many factors which really are trade features in the selling price?

A. It is.

Q. As you have said, the market quotations are simply what the owner would like to get, and not any proof as to what he does get?

A. That is it exactly. I have heard of lots being bought lower than the quotation sent out on them.

Q. These are quotations on a small quantity and do not mean that these are the current prices on 200 barrel lots but merely for one or two barrels to druggists?

A. That is true.

Q. If you had a warehouse receipt and were offering it for sale through this Freedman-Richard concern would the owner of that receipt get anything like the prices they quote to druggists?

A. He would not. He would not even get the price named because he would have to deduct all the carrying charges to the date of sale.

Q. Likewise the broker's commission?

A. Likewise the broker's commission.

Re-examined by General Dawson:

Q. You dont know whether this Kentucky whiskey which is quoted here is stored in a Kentucky bonded warehouse or not?

A. I know the Old Crow-Rye is in a Kentucky warehouse but I dont know about the other brands.

Q. How do you know it is in Kentucky?

A. Because all of the Old Crow-Rye whiskey in Bond is now in our warehouse for the reason that it was all taken by one firm in New York, H. B. Kirk & Co. and they have been selling warehouse receipts to this Freedman-Richard concern for the last two or three months, something they never did before. I might add to that that there was some Old Crow whiskey sent to a general bonded warehouse in New York last Fall at which time the owners expected to export it but they did not export it and they wrote us about a month ago that they had tax-paid that and withdrawn it from Bond from the New Jersey warehouse all the Old Crow-Rye that is not in Bond so that from that date up to the present time all the Old Crow in Bond is in our warehouses.

Q. You have bottled whiskey on orders sent from the trade?

A. Not within the last few years.

Q. By the Master: Do you think the price of Old Crow Rye whiskey can throw any light on this controversy?

Mr. Helm: I dont think it throws the slightest light.

General Dawson: I am not insisting on the price of Old Crow-Rye.

The Master: You have taken a lot of evidence on it.

Gen. Dawson: I think this question is important though. What is the whiskey that has been manufactured in Pennsylvania, Rye or Bourbon?

A. Principally Rye. I never heard of any Bourbon being made there.

Q. What about the Maryland whiskey?

A. All Rye.

Q. What about the great bulk of distilled spirits in bonded warehouses in Illinois?

A. Of that I would have no knowledge but I would say from my general opinion that that is Bourbon.

Q. The greater part of the spirits they have there is what is known as high wines?

A. Illinois has always been known as a place where high wines and things of that character were manu-



factured, around Peoria, but we had very little occasion to have any dealings with them. We never had any dealings with them and had no occasion to investigate what they were making.

Q. So that when you get out of Kentucky in a large measure Kentucky whiskey comes in contact with Rye whiskey and with the products of the Illinois distillation.

A. Kentucky whiskey is not in competition with all of them because the value of brands has been destroyed. Whiskey is now whiskey most any place, especially in selling to druggists because they are less inclined to buy good whiskey than any customers the distillers ever had.

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ALFRED B. FLARSHEIM, called for the defendants, being duly sworn and examined by General Dawson, deposed as follows:

Q. What is your name?

A. Alfred B. Flarsheim.

Q. What is your business?

A. Vice-President and General Manager of the Bernheim Distilling Co.

Q. Has that company any liquor on hand?

A. It has unfortunately.

Q. State whether or not since the March 12th, 1920, your company has sold any liquor to the trade, which under the terms of the Act of the Legislature which is attacked in this Bill, the 50 cents tax is due on?

A. It has.

Q. How much have you sold?

A. I presume I am permitted to look at my memorandum?

Q. Yes.

A. Of Kentucky whiskeys stored in Kentucky—may I make that distinction, stored in Kentucky, because the Bernheim Distilling Co. was fortunate enough to have a great many barrels of Kentucky whiskey stored outside of Kentucky—but of Kentucky whiskeys stored in Kentucky we have sold since March 12th, 1920, only 59 barrels.

Q. Have you sold any case goods?

A. We have.

Q. State how much case goods you have sold?

A. Of Kentucky whiskeys stored in Kentucky since

March 12th, 1920, we have sold 1718 cases bottled in Bond.

Q. Where did that liquor largely go?

A. To various parts of the country, Chicago, Pennsylvania, New York and other points.

Q. How much of your whiskey in Bond did you sell from Kentucky during the month of February, 1920?

A. I have not those records and I am unable to state.

Q. Will you examine your records before the testimony is completed and at a later date give that amount?

A. I will.

This amount was later telephoned to the stenographer as 38 barrels.

Q. How much of case goods did you sell from your Kentucky warehouse during the month of February, 1920?

A. Same answer as to the previous question, have no records with me.

Q. I make the same request for you to furnish that information to the stenographer.

A. I will do so.

This information was afterwards telephoned to the stenographer as 341 cases. See copy of letter at end of deposition.

Q. What have you been getting for your barrel whiskey sold from your Kentucky Distillery Warehouse since the 12th day of March, 1920.

Mr. Helm: I object on the same ground heretofore given that sales by other distillers of their particular brands to old or new purchasers are not competent or relevant. The only proper question is as to the current market price of whiskeys within and without Kentucky.

The Master: That might throw some light on the matter.

A. I have no record but my recollection is that we have been receiving around \$1.40.

Q. To get this accurately in the record will you examine your records on that and report that also to the stenographer?

A. If I am compelled to answer I will look up the records.

Mr. Helm: I object to requiring these gentlemen to go to their records and dig up averages on commodities sold under particular circumstances at various times and to strike a general average on it, as throwing no light on the question involved. I might also add that this has no

bearing in determining the validity of a tax, in other words whether a particular distiller can sell at \$1.40 or can sell at 90 cents where the tax is absolutely and uniformly 50 cents. I don't think it is of the slightest importance.

Gen. Dawson: Putting one man out of business does not make a tax invalid. It is putting the class out of business. I don't think the witness is compelled to disclose any secrets or the names of any customers or particular prices on particular lots. The witness from an examination of his records of his sales can be asked to state what was the market price of the whiskey at the particular date in controversy. I do not mean by this that we can put on the witness the burden of making any extensive search of his records but only such examination as will enable him to answer the question.

Q. Now with that understanding or ruling, will you furnish the information to the stenographer?

A. I will, but I think I can answer it right now. By reason of our maintaining practically the only extensive organization, we are obtaining more for our merchandise than current market provisions and our average is about \$1.40 from which should be deducted the expense of conducting our business.

Q. Of course, that price does not include the Government tax or the warehouse charges or the 50 cent tax.

A. No. That price is accrued charges paid to date of sale. When I say "accrued charges" I mean storage, insurance, and other incidental charges such as interest on money invested, etc.

Q. You pay those?

A. Yes, sir.

Q. About what would that average per gallon for four year old whiskey?

A. I am unable to state that without checking that up. We have figured that it almost doubles the original purchase price.

Q. What was the original purchase price of your warehouse receipts for whiskey?

A. The original cost of manufacture was around 50 cents but a great many of these warehouse receipts we now own were purchased at a very much higher price during the advancing market prior to the going into effect of the Eighteenth Amendment.

Q. Can you give the average price per case of your

goods that you sold from your distilleries since the 12th of March, 1920?

A. About \$19.40 per case.

Q. Of course, you make a profit at that price?

A. We make some profit at that price.

Q. Your whiskey is Bourbon whiskey?

A. We make both Bourbon and Rye in Kentucky.

Q. The prices you are getting are the prices on Bourbon whiskey?

A. They are the prices on either. Since the elimination of the value of brands, it makes very little difference in the purchase of Kentucky whiskey whether it is Rye or Bourbon. I understand it is all sold as spiritus frumenti on doctors' prescriptions to druggists and "spiritus frumenti" label is placed over the brand.

Cross-examined by Mr. T. K. Helm:

Q. The Bernheim Distilling Co. with which you are connected deals directly with the trade?

A. It sells its commodity directly to the trade.

Q. Do you deal in the purchase and sale of warehouse receipts?

A. We do.

Q. Are you familiar with the market quotations when whiskey is sold through negotiable warehouse receipts evidencing the ownership of whiskey in Bond through brokers and Commission merchants?

A. Yes, sir.

Q. What is the prevailing market price in the United States of Bourbon whiskey stored in Bond when the sale is evidenced by the transfer of a negotiable warehouse receipt.

Q. For goods made in Kentucky, around \$1.00 per gallon, some lower and some a little higher.

Q. What is the current market price on similar goods outside of Kentucky?

A. From 50 to 75 cents a gallon higher for the same goods if stored in the market nearest the average consumption which is New York and Boston.

Q. Is the same true of most whiskey that some of them have a sort of reputation and brand and their location and reputation influences the actual sale?

A. That was my experience but I will state if permitted to that there has been a decided falling off in the sale of our whiskey since the passage of this 50 cents per gallon Act here.

Q. I didnt catch your answer with reference to the prevailing market price of warehouse receipts evidencing the ownership of whiskey stored in a warehouse outside of Kentucky. State what that market price is?

A. From \$1.50 to \$2.00.

Q. So that if a man who has a right to use whiskey undertakes to buy warehouse receipts for liquor outside of Kentucky he pays \$1.50 more than if he gets it in Kentucky?

A. No, sir; from 50 cents to 75 cents a gallon more.

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JOSEPH E. OPPER, called for the defendants, being duly sworn and examined by General Charles I. Dawson, deposed as follows:

Q. Do you live in Louisville?

A. Yes, sir.

Q. With what distillery are you connected?

A. Sunnybrook.

Q. What is your position?

A. General Manager.

Q. As a general manager in a general way do you have charge of the sales?

A. I have nothing to do with the sales.

Q. As general manager are you familiar in a general way with the quantity of liquor which has been shipped from your warehouses to the trade in different parts of the country since the 12th day of March, 1920?

A. Yes.

Q. Have you shipped and sold any since that date?

A. We have withdrawn from Bond and shipped I suppose in the neighborhood of 350 barrels what we tax-paid prior to March 12th and had on hand March 12th figuring on barrels. Of course some has been put up in cases since then but taking it in barrels I would take it that we would run 1200 or better, in other words, 75 or better with goods tax-paid prior to March 13th, 1920, before the fifth cent tax law went into effect. We tried to beat that.

Q. Where were those goods taxpaid?

A. On our premises.

Q. In a bonded warehouse?

A. They were taxpaid the 10th of March about, a few days before the Bill was signed. We took them out to beat that tax.

Q. You have sold 250 barrels outside of that?

A. That is all we have shipped.

A. Have you sold some more outside of that?

A. I don't know anything about sales.

Q. How much case goods have you shipped since the 12th day of March?

A. That was included but I don't know just how many. I should judge it would be maybe ten or twelve thousand cases. We bottled some goods since that we are holding today.

Q. Have you orders for goods now?

A. Very little.

Q. Where have the goods you have been shipped since the 12th of March gone to in a general way, not to what customers but to what territory?

A. Chicago, New York and Providence.

Q. Have any gone to Pennsylvania?

A. I don't recall any. There may have but I don't recall it. I don't pay much attention to the destination of whiskey.

Q. But all of it has gone out of Kentucky has it not?

A. Yes, sir.

Q. And has gone in competition with liquor on which this 50 cent tax imposed by the last Legislature is not levied?

A. Yes, sir.

Q. What has been the average price per gallon of the liquor you have sold?

A. I could not answer, I did not pay attention to that. I don't get any quotations. I am not in the sales end.

Q. Do you know how much liquor your concern shipped to the trade in the month of February, 1920?

A. No.

Q. Will you look that up and give it to the stenographer?

A. Yes, sir.

This information was afterwards telephoned to the stenographer as 19766.33 gallons.

Q. Do you know how much you shipped in the month of January, 1920?

A. I shall have to look that up.

Q. I make the same request with reference to that information?

A. All right.

This information was afterwards telephoned to the stenographer as 9,003.91 gallons.

Q. I will ask you also to give to the stenographer after examining your records, the amount you shipped during the month of April, 1920, and the amount you have shipped up to this date in the month of May, 1920?

A. All right.

This information was afterwards furnished to the stenographer as follows: April, 20,552.57 gallons May, 17,002.70 gallons.

See letter at back of depositions.

Q. State whether or not it is true that just before the 16th day of January, 1920, a great many distillers and dealers in liquors under Government permit removed quite a quantity of liquor into what is known as export bonded warehouse and which was caught when January 16th came on and did not get into the export trade: Is that so?

A. Yes, sir.

Q. This liquor you are selling from your bonded warehouses with this 50-cent tax is coming in contact with that liquor?

A. That we are selling—

Q. Is not some of that liquor being sold to the trade now?

A. I don't know, but I presume it is.

Cross-examined by Mr. Levi Cooke:

Q. The data that you have been asked to furnish to the stenographer as to your shipments during the months mentioned by the Attorney General would cover case goods that were withdrawn prior to March 12th?

A. Yes, sir.

Q. Some of which was still in your possession in free warehouses after March 12th?

A. Yes, sir.

Q. And which you have been shipping since that date?

A. Yes, sir.

Q. What liquors you have taxpaid and withdrawn since March 12th which may be subject to this 50-cent tax is only a small part?

A. I mentioned that at the beginning, that in barrels or cases reduced to barrels I would judge we had on hand of all kinds 1200 barrels taxpaid without the payment of the 50 cent tax. That was shipped from March 12th to a few days ago. Since that time on which

we have had to pay the 50 cent tax there has been about 350 barrels.

Q. Your company handles exclusively its own product?

A. Yes, sir.

Q. Your company expected a test to be made on the validity of this 50 cent tax?

A. Yes, sir.

Q. By Gen. Dawson: Are there any warehouse receipts out in the hands of purchasers of your liquor which is now stored in your bonded warehouse?

A. I suppose there are. I have not examined the records but I take it for granted that there are.

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MARION E. TAYLOR, called for the defendants, being duly sworn and examined by Gen. Dawson, testified as follows:

Q. State your name?

A. Marion E. Taylor.

Q. With what distillery are you connected?

A. I am President of Wright and Taylor, Inc.

Q. They manufacture Kentucky Bourbon Whiskey?

A. They used to and Rye also.

Q. Could you give the stenographer approximately the amount of whiskey that your concern has shipped from its warehouses to the trade since the 12th day of March?

A. I have been away about a couple of months so I have gotten it from the books, it has been furnished me by my manager. Proof gallons, total 3,699. Whiskey sold outside of the state since March 12th, 1920. Then of warehouse receipts, we have sold approximately 25,000 gallons, original gallons, warehouse receipts are sold on original gallons.

Q. Are you able to state the amount of liquor that you sold and shipped to the trade during the month of February, 1920?

A. I have no record but I am sure I can get that from my books.

Q. I will ask you to furnish that to the stenographer.

A. Outside of the state?



Q. Irrespective of where it was.

A. During the month of February, 1920?

Q. Yes. And furnish the same information for the month of January, 1920.

A. All right.

This information was afterwards telephoned to the stenographer as none during January, 435 proof gallons during February.

Q. In your January information please show what portion of that was export whiskey?

A. All right.

Of the above mentioned amount sold during January, 1920, the amount of export whiskey was none.

Q. What have you been getting on an average for warehouse receipts which you have sold since the 12th day of March?

A. I am really not familiar with all of the sales, in fact, with only a few of them, because as I say, I have been away two months on account of my health and only got back two or three weeks ago but we have very little whiskey of our own in our warehouses but we have a good deal of whiskey there for our customers and since this 50 cents a gallon tax they have been offering it to us—before the 50 cent tax it was offered at \$1.25. Two of our large customers from Chicago came down last week to the Derby and came in on Friday and, discussing this 50 cents a gallon tax, said they wanted to sell their whiskey and wanted to know what we would give them for it and we told them we didnt care to buy it, that we could not offer them anything like the price they paid for it, and we finally offered them 75 cents for it. They said “you offered us once \$1.25” and we told them that was before the 50 cents a gallon tax went on and we were not sure that we would have to pay this tax but we would take a chance and offer them 75 cents and they took it and said they were glad to take it. I said that from what our gathered our whiskeys have been selling all the way around from \$1.00 to \$1.75. Some of that whiskey that we have sold for \$1.75 was in small quantities to retail customers. I have here the sale of some spirits we had—

Q. Is this whiskey?

A. This is called spirits but it is put up in Bourbon barrels and marked Bourbon. Of this whiskey we have sold since March 12th, 240 barrels of spirits made out-

side of the State of Kentucky and stored outside of the State of Kentucky at 60 cents a gallon in Bond. Deducting the carrying charges and interest, these goods have netted us less than 50 cents per gallon. We have between 100 and 200 barrels stored in the state of Kentucky of the same whiskey and with this withdrawal tax of 50 cents at present they have no market value whatever. We have not been able to secure an offer for them at any price.

Q. What do you mean by "spirits" as referred to in your last answer.

A. Spirits are goods that some of these distillers make. It is a continuous whiskey that they make and put in charred barrels and brand "Bourbon" but it is known to the trade as spirits. Spirits put in barrels not charred are colorless but if they are put in charred barrels it gives them a color, and having a certain percent of small grain, it makes a merchantable whiskey to drink.

Now we have had some whiskey—this spirits stored here in Kentucky made by a distillery here that makes that character of whiskey and we haven't been able to get an offer on it because the purchaser will have to pay the 50 cents a gallon tax on it when it is shipped out of the state.

Q. It is a very inferior grade of whiskey?

A. No, it is not inferior. It is really superior. It is purer than fine Bourbon whiskey because it has very little fusel oil.

Q. Still it is not whiskey that appeals to the trade?

A. No but it will sell today just as well as Old Crow or Old Charter or Old Tavern or any other fine grade of whiskey, because brands are not considered now.

Q. Don't you know that the druggists who buy the bulk whiskey demand a better grade of whiskey than that?

A. If they can buy this whiskey as cheap or a little cheaper they will buy it. Some druggists are not very particular about that. I don't think this is as good for beverage purposes as some brands of Kentucky Bourbon. I don't claim that. If it were, we could get more for it than 60 cents a gallon.

Q. Among the whiskey people it is not known as a Bourbon whiskey.

A. It is known to the dealer as a Bourbon whiskey.

Q. But among the men who make whiskey and who

know what whiskey is, it is not regarded as a Bourbon whiskey?

A. No, I would not say it was generally.

Q. Is it not a fact that one large dealer in whiskey in this section has contracted with you from your distillery to bottle and prepare a lot of whiskey for him under his label?

A. I have just recently made a contract for a few thousand cases of our whiskey which they want their label put on instead of ours. Our regular government label that it is made Old Charter goes on but he wants a little sticker of his brand.

Q. That liquor is for the purpose of—

A. Selling to somebody to whom he has been selling and he wants it to go as his brand.

Cross-examined by Mr. Helm:

Q. As I caught one of your answers it was that you had 240 barrels of double strength spirits made in Cincinnati and stored in Cincinnati, Ohio, which you could sell or did sell at 60 cents per proof gallon; that you had a quantity of the same character of double strength spirits subject to this 50 cent tax stored in Kentucky that you cannot dispose of?

A. Yes, sir; we have offered it at 60 cents a gallon and we cannot find a purchaser, in fact, we cant get an offer on it.

Q. Are you familiar with the current market price outside of Kentucky of ordinary whiskey in Bond of no special brand?

A. I think the price list I have seen recently show that you could buy a dozen different brands of Kentucky whiskey for less than \$1.00 per gallon. And when I say a dozen different brands, I mean in that some brands that have as good a reputation as mine or anybody's else. I dont think they are considering brands now when they buy whiskey.

Q. Is it not true that frequently an established name or an established brand like Old Charter whiskey is ordered by people who ask no questions about price but who simply say send me some Old Charter whiskey.

A. The bulk of our orders come just that way with-

out asking the price and our agents will take an order—the market changes on whiskey like everything else—and our agents have sent orders in and left the price blank and left it to us to give the best price we can.

Q. People dont trade in warehouse receipts that way?

A. I dont think they do.

Q. Do you know of whiskey manufactured in Kentucky having been transferred to a general bonded warehouse located outside of Kentucky since the passage of this law?

A. I only know from hearsay in a general way that there is a great deal of Kentucky whiskey that has been transferred to bonded warehouses in San Francisco, Boston, Chicago and other places and I do know it to be a fact that Wright and Taylor shipped to Boston 150 barrels and the greater part of it we have there yet in bonded warehouses and the only reason we didnt ship a thousand barrels was because we couldnt get the room in the warehouse and that whiskey we can get a very much better price for and are getting a higher price for than whiskey stored in Kentucky on account of this 50 cents a gallon tax.

Q. Have you any idea of the approximate quantity of distilled spirits known as whiskey stored in bonded warehouses in Kentucky and the approximate amount of similar commodities Bourbon or Rye or Spirits which can be converted into whiskey stored outside of Kentucky?

A. I know from reports I have seen recently that there approximately 30 or 40 million gallons of whiskey in Kentucky. I saw that report several weeks ago. I do not know the quantity in the State now. I think the general estimate of the amount of whiskey in the United States from the Internal Revenue Department at Washington is about 60 or 70 million gallons.

Q. Is there any reason why under the present condition a distillery cannot run and produce whiskey for non-beverage purposes?

A. I think the Large Distillery is the only one which has a permit to run and up until recently, they have been running but I think the Government will issue a permit to manufacture whiskey for non-beverage purposes—I

am pretty sure of it. The Large Distillery is in Pennsylvania.

Q. You spoke of the sale of your whiskey or the receipts at certain prices. Have you made any deductions for the overhead and the selling expense connected with the disposing of such whiskey as may be in bond?

A. We calculate that our overhead expenses are about 25 per cent and they are increasing all the time on account of the increase in the price of labor. We are paying girls to bottle our whiskey \$3 and \$4 a day when we used to pay them \$8 or \$10 a week and all other labor in proportion. Everything is high. Boxes are two or three times up in price. We used to get a box from the Mengel Box Co. at 26 cents and that same box is 80 cents now. Bottles have increased in price proportionately and so have labels so that the cost instead of being \$1.00 or \$1.10 per case to put up whiskey is now \$3.75 or \$4.00.

Q. When you talk about selling goods bottled and put up in cases you are selling them on the quantity in the bottle and not on the original gauge?

A. No, sir.

Q. There is a loss of approximately 20 per cent in the whiskey from the amount originally put in the barrels?

A. More than 20 per cent.

Q. So that when you are fixing a price on bottled goods you are fixing a price on 20 per cent less than what the goods were originally?

A. We have to take that into consideration, the loss of the whiskey in figuring the cost.

Q. That is the loss in shrinkage in storage?

A. In storage and in dumping.

Q. But the market price placed on the warehouse receipt is based on the—

A. —original proof gallons.

Re-examined by Gen. Dawson.

Q. When you sell a warehouse receipt now and a man pays you the price for it, does the contract require that he pay the storage charges?

A. The warehouse receipts are sold with all charges paid up to the date of sale.

Q. And you say you can get a good deal more for your warehouse receipts for your liquor stored in Boston than in Kentucky?

A. Yes, sir.

Q. And are getting more?

A. Yes, sir.

Q. How much more?

A. I have not noticed as to that whiskey stored in Boston very recently and I am not able to say.

Q. About how much more from your general information?

A. I should say there was 50 cents a gallon difference.

Q. So that if a man wants to buy warehouse receipts from you in Boston you get 50 cents more than you would get for the warehouse receipts in Kentucky?

A. Yes, sir. The whiskey is there stored in this warehouse and the reason we have sent it there is because our trade is very large in the New England States and we wanted to have the whiskey there so that they could get it quickly.

Q. The truth is a man buying warehouse receipts for liquor stored some place besides Kentucky has to pay considerably more than he would pay for warehouse receipts of the same kind stored in Kentucky?

A. Yes, sir.

Q. Have you any of those quotations that you referred to a while ago that you had seen as to the price of liquor outside of Kentucky?

A. No but I think Mr. Flarsheim has some.

Mr. Flarsheim: I have non quoting prices of goods outside of Kentucky but I have similar cards to those produced.

Mr. Taylor: Those are the cards that I have seen referring to Gordon No. 23.

Mr. Flarsheim: These cards gave quotations on good presumed to be unless otherwise mentioned in the original warehouses.

A. C. THOMPSON, called for the defendants, being duly sworn and examined by General Dawson, testified as follows.

Q. Where do you live?

A. Frankfort, Ky.

Q. Are you connected with a distillery?

A. Treasurer of the Frankfort Distillery.

Q. What character of whiskey does your distillery manufacture and handle?

A. Bourbon whiskey and Rye whiskey.

Q. State whether or not since the 12th of March your concern has been able to ship and has sold and shipped from its bonded warehouses any whiskey?

A. We have shipped since the 12th of March some barrel goods and some case goods.

Q. How much altogether in gallons?

A. 75 barrels and 510 cases since the 12th day of March.

Q. Have you the figures to show what your concern shipped after the 16th of January and up to the 12th of March?

A. No, sir.

Q. Will you get that information and transmit it to the stenographer?

A.—Yes. 135 barrels and 573 cases. See letter at back of depositions.

Q. Where has the bulk of your whiskey been shipped to since the 12th day of March?

A. Milwaukee, Chicago and Hartford, Connecticut.

Q. Has it been shipped to retailers or wholesalers?

A. Some to retailers and some to wholesalers.

Cross-examined by Mr. J. Helm.

Q. Was any of that whiskey tax paid before the date when this fifty cent tax law went into effect?

A. The barrel goods was not tax paid before—none.

Q. By Mr. Cooke: How many barrels of whiskey have you in bond at your distillery?

A. 12,000.

Q. 12,000 in bonded warehouses still untaxpaid?

A. Yes, sir.

Q. How many barrels have you shipped since March 12th?

A. 75.

Q. Were those barrels shipped on warehouse receipts?

A. Which had been previously sold.

Q. So you shipped 75 barrels out of 12,000 in your bonded warehouse since March 12th?

A. Yes, sir.

Q. And to people who owned the warehouse receipts?

A. Yes, sir.

Q. So your shipments of barrel goods since March 12th and to May 15th have been 75 barrels out of 12,000?

A. Yes, sir; out of a little more than 12,000. There were twelve thousand and two or three hundred.

Q. By Gen. Dawson: Were those sales made and those shipments made on sale permits?

A. The customer sent the permit in.

Q. So that they were all for sales and it was not the owner of the receipts transferring them from one place to some place else?

A. The owner of the whiskey—of the receipt had the whiskey sold.

Q. But it was going to the trade—it had been sold?

A. Yes, sir.

Q. By Mr. Cooke: You do not know when the whiskey or the warehouse receipts rather had been acquired by the owner?

A. Prior to January 1, 1920.

Q. In other words the barrels were shipped to people who had owned the receipts for sometime?

A. Yes, sir.

Q. By Gen. Dawson: Have you sold any warehouse receipts since the 12th of March?

A. No, sir.

Q. By Mr. Cooke. Your warehouse receipts have not been moving from hand to hand since March 12?

A. They have not.

Q. By Mr. Dawson: You have no way of knowing that?

A. We are trying to locate all the owners of warehouse receipts and we have requested the last owner to notify us when they sell the receipts and we have only been notified of about twenty-five barrels in the last three months that have been sold.

Q. So that this dearth of sales in warehouse receipts was going on before the Vance act was passed—this lack



of trading in warehouse receipts were going on even before the Vance act was passed in March?

A. I suppose so.

Q. By Mr. Cooke: Your whiskey has been moving slowly?

A. Very slow.

Q. In fact, the sales in all markets were restricted?

A. Yes.

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D. L. LALLY called for the defendants, being duly sworn and examined by Attorney General Dawson, testified as follows:

Q. With what distillery are you connected?

A. Labrot and Graham.

Q. At Frankfort?

A. Yes, sir.

Q. Are you able to state to the stenographer the number of gallons of whiskey that has been shipped from your distillery warehouse since the 12th day of March, 1920?

A. We have shipped the proceeds from the bottling of 46 barrels, approximately 580 cases.

Q. Was that all shipped on sale permits?

A. Yes; the customer sent in the warehouse receipts and we bottled it for him from the warehouse.

Q. Are you able to give the stenographer the number of gallons of whiskey you shipped from your warehouse from the 16th of January, 1920, up to and including the 11th day of March, 1920?

A. No, sir; not now.

Q. I will ask you to examine your records covering the period referred to in the previous question and furnished that information to the stenographer?

A. I will do so.

128 barrels or 5,005 gallons of which 78 barrels were transferred in bond to Louisville Public Warehouse Co. See letter.

Q. About how much whiskey has your company in bond?

A. Approximately 2900 barrels—that is the total in bond and out.

Q. Have you sold any warehouse receipts since March 12?

A. No, sir.

Q. By Gen. Dawson. Did you sell any warehouse receipts during the month of January, 1920.

A. No, sir.

Mr. J. E. Opper,  
City.

Dear Sir:

I am handing you the figures you asked for, that is, what our shipments were for January, February, March, April and May, 1920.

They were as follows:

January	9,003.91	Gallons
February	19,766.33	"
March	37,757.56	"
April	20,552.57	"
May	17,092.70	"

This takes in all of the shipments to May 12th, 1920. The 50c tax is payable on the following:

March	884.39	Gallons
April	8,115.00	"
May	10,203.00	"

In other words, the total amount of shipments amount to 104173.07 Gallons.

The shipment exempt of the 50c tax amount to 84968.68 Gallons, and the shipments liable to the 50c tax amount to 19202.39 gallons.

Your very truly,  
(Signed) Thomas J. Leahy.

Mr. Clarence E. Walker,  
Louisville, Ky.

Dear Sir:

As per your request to A. C. Thompson, who was summoned as a witness in the case of J. & A. Freiberg v. Louisville Public Warehouse Co., beg to state that during the period from Jan. 17, 1920, to March 11, 1920, there was shipped from this distillery to points outside of Kentucky 135 barrels and 573 cases of whiskey.

Yours very truly,  
The Frankfort Distillery, Inc.

Mr. Clarence E. Walker,  
901 Realty Building,  
Louisville, Ky.

Dear Sir:

Replying to Attorney General's question as to quantity of whiskey shipped from January 16th, 1920, to and including March 11th, 1920, will say that we shipped 128 barrels or 5005.00 gallons of which 78 barrels were transferred in bond to the Louisville Public Warehouse Co., Louisville, Ky.

D. A. Lally.

1 Total Number of Bbls. Ky. Goods sold during month of January, 1920.

38 Total number of Bbls. Ky. Goods sold during month of December, 1920.

49 Total number of Bbls. Ky. goods taxpaid for customers from January 16th to March 12th 1920, inc.

58 Total number of Bbls. Ky. goods sold from Jan. 16th to Mch. 12th inc.

1371 Total number of cases sold from January 16th to March 12th inc.

6423 Total number of cases sold during the month of January 1920.

341 Total number of cases sold during the month of February, 1920.

5200 Total number of cases exported during the month of January, 1920.

Of the case goods sold after March 12th previously testified to quite a large portion were taxpaid prior to that date (March 12th).

**EXHIBIT GORMAN No. 1**—Clarence E. Walker.

**EXHIBIT GORMAN No. 2—Clarence E. Walker.**

**FREEDMAN & RICHARD**

Cincinnati, O.

Commission Merchants

609 Mercantile Library Building

May 11, 1920

Long Distance Telephones, Main 721, Main 722

**OUR DAILY SPECIAL**

**WE QUOTE WAREHOUSE RECEIPTS**

25 bbls. Spring '17 Farmdale Rye (in bond Boston)	1.50
35 bbls. Fall '16 Kickapoo (Illinois goods)	1.40
15 bbls. Spring '16 Haviland Rye (Illinois goods)	1.40
25 bbls. Spring '16 Clinton (Ohio goods)	1.40
5 bbls. Spring '15 Hayner (Ohio goods)	1.45
25 bbls. Spring '15 Jack Beam	1.25
10 bbls. Fall '16 Graves Prune Brandy (Slivovitz) in bond N. Y.	2.60

No. 465

**FREEDMAN & RICHARD**

If What You Want is Not on this Card, Write or Wire Us.

We HAVE it or Will GET It.

NOTE:—As our daily special offerings are at very attractive prices we suggest that you wire or telephone your orders as "first come will be first served"

**WHAT HAVE YOU FOR SALE? SEND US YOUR LIST**

(Addressed to J. P. Williams, Frankfort, Ky.)

**EXHIBIT GORMAN No. 3—Clarence E. Walker.**

**FREEDMAN & RICHARD**

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May 4, 1920

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No. 464

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**WHAT HAVE YOU FOR SALE? SEND US YOUR LIST**

(Addressed to Bernheim Dist. Co., 626 W. Main St., Louisville, Ky.)

**Affidavit of T. K. Helm**—Filed May 20, 1920.

Affiant, T. K. HELM, being first duly sworn on oath states:

I am one of the attorneys for the plaintiff in this case and am associated with Levi Cooke of Washington, D. C., also attorney for plaintiff, and about 10:30 A. M., May 10th I received the following telegram:

“Rosenbloom who was here Saturday sent the following telegram to Col. E. H. Taylor.

‘Cooke & Beneman have explained to me their reason for preferring to try case testing validity of Vance Act in Federal court. From their statement of reasons I am inclined to agree that Federal test is preferable. Believe it advisable therefore that State suit be withdrawn. Wire me care Willard Hotel.’

He received the following reply:

‘Have dismissed case although I think you are mistaken.’

Confirming telephone conversation suggest you ascertain whether or not suit has been dismissed in Franklin Circuit Court and use your best judgment regarding communication of state of that record to District Court. Levi Cooke.”

Affiant further says that he telephoned to Kelly C. Smithers, Clerk of the Franklin Circuit Court, who stated that such an order of dismissal had been prepared but could not be entered during the adjournment of Court except by consent and then as of the last day of the Court, which if done would show a dismissal prior to the granting of the restraining order. He further informed affiant that he understood that plaintiff's attorneys, Hazelrigg & Hazelrigg, had communicated with the Attorney General who objected to the entry of the order of dismissal during the vacation of the Court.

Affiant thereupon requested the Clerk of the Court to request plaintiff's counsel, Hazelrigg & Hazelrigg, to advise the affiant as to what was the true status of the proceeding in the case of S. Rosenbloom & Company, plaintiff v. E. H. Taylor, Jr. & Sons, etc., defendants, and affiant has just received from S. Rosenbloom & Company's counsel the following letter:

"J. H. Hazelrigg      D. L. Hazelrigg  
Hazelrigg & Hazelrigg  
Attorneys at law  
Frankfort, Ky.

May 19, 1920.

Mr. T. Kennedy Helm,  
c/o Trabue, Doolan, Helm & Helm,  
Columbia Bldg.,  
Louisville, Ky.

Dear Mr. Helm:

It had been our purpose, following instructions to that effect from our client, Mr. Rosenbloom, to remove any obstacle growing out of the suit here which was in the way of your Federal proceeding at Louisville. When word came from Mr. Rosenbloom, however, our Court had adjourned its April term and no orders can be entered.

Under the circumstances all that we see that can be done is our statement of intention to take such steps, and we could give you copy of a motion which we propose to have entered when Court meets in September just as soon as we hear from Mr. Rosenbloom as to whether this is satisfactory to him.

You are of course familiar with the Rosenbloom suit and know that it involves other questions than the mere constitutionality of the fifty-cent law, namely: whether the whisky bottled for export last year, but which has not been removed from the distillery premises, is liable for the two or the fifty cent tax. Inasmuch as this question involves a very large amount of money we cannot believe that Mr. Rosenbloom desires to dismiss the suit here outright.

As we understand the circumstances however, the only thing in the suit here which stands in your way at Louisville is the matter of injunction and as soon as we hear from Mr. Rosenbloom, after explaining this matter to him fully, we will send you copy of the proposed motion.

Yours truly,  
(Signed) Hazelrigg & Hazelrigg."

DLH:MEH

Further affiant saith not.

T. K. HELM.

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**Opinion**—Filed May 31, 1920.

Motion for preliminary injunction.

Before DENISON, Circuit Judge, and WALTER EVANS and SATER, District Judges.

Decided May 31, 1920.

Section 171 of the Kentucky Constitution provides that taxes "shall be uniform upon all property of the same class subject to taxation." Section 172 says that all property shall be assessed for taxation at its fair cash value. Section 174 directs that all property shall be taxed in proportion to its value—without prejudice to the right to provide for taxation based on income, licenses or franchises. Section 181 says: "The General Assembly may, by general laws only, provide for the payment of license fees on franchises \* \* \* the various trades, occupations and professions, or a special or excise tax."

Prior to 1917, such license taxes as there were on manufacturing or wholesale dealing in distilled spirits had been by way of an annual tax of a fixed sum. In 1917, in the course of a general revision of the revenue laws of the state, it was provided by Chapter 5 of the Acts of 1917, that every corporation or person engaged



in the business or occupation of manufacturing distilled spirits, and every owner or proprietor of a bonded warehouse in the state, in which such spirits are stored, should, in addition to other taxes, pay a license tax of two cents on every proof gallon liable to federal tax; that every distiller and every bonded warehouseman should make quarterly reports showing the amount of distilled spirits removed from the warehouse by payment of the federal tax or transferred under bond during the quarter, and at the time of making the report pay the tax of two cents per gallon. The proceeds of the tax were distributed, twenty per cent to the road fund, thirty per cent to the school fund and fifty per cent to the general fund.

In January, 1920, when the Eighteenth Amendment to the federal constitution was declared to take effect, there remained in storage in bonded warehouses, in Kentucky, approximately 50,000,000 gallons of distilled spirits, and there was approximately the same amount (probably somewhat more) in storage in bond in the remainder of the United States. On March 12, 1920, the Governor approved an act of the General Assembly repealing Chapter 5 of 1917, and substituting a revision of generally similar purport. The first section thereof, as so revised, is as follows:

“Every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits, known as whiskey or brandy or other species of double stamp spirits, in this State; and every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in this State, and in removing same therefrom for the purpose of sale, or for any other purpose, shall pay an annual license tax to the Commonwealth of Kentucky of fifty cents on every proof gallon of said distilled spirits so manufactured or

stored in a bonded warehouse, or withdrawn from a bonded warehouse, or transferred therefrom under bond out of the Commonwealth of Kentucky."

Section 2 directed that every owner of a bonded warehouse should make to the State Auditor a monthly report, on the first of each month, showing the number of proof gallons withdrawn or transferred since the last report. Section 3 directed the warehouseman, at the time of making each monthly report, to pay to the Auditor fifty cents upon each proof gallon which had been removed from the bonded warehouse or transferred under bond out of the state, and further provides:

"and for the purpose of securing the payment of the license taxes herein provided for, the Commonwealth shall have a lien on all such spirits stored in such bonded warehouses, together with the other property of the bonded warehouseman used in connection therewith; and in all cases where the spirits so removed or transferred were owned or controlled by another than the bonded warehouseman, then the bonded warehouseman shall collect and pay the tax due on such spirits so removed or transferred under bond, and shall be subrogated to the lien of the Commonwealth."

Section 4 required that every distiller pay this license tax upon the product of his manufacture when removed from his premises, unless then placed in a bonded warehouse; that all distillers shall file a monthly statement with the Auditor showing the amount of spirits so removed and not going into a bonded warehouse, and at the same time pay the specified license tax thereon. Section 5 provides that every person or corporation failing to make reports as directed, and failing to pay the taxes as they become due, shall be guilty of a misdemeanor, and upon conviction be fined not less than \$500 nor more than \$1,000, and that each day that such taxpayer is in

default after the date such report is due "shall be considered and treated as a separate offense." Section 6 gives the proceeds of the tax, sixty-five per cent to the road fund and thirty-five per cent to the general fund. Section 7 declares that the license tax of the statute shall be in lieu of all other license, franchise or excise taxes now imposed by law on persons or corporations engaged in business covered by this Act; and repeals Chapter 5 of 1917. Section 8 recites that, whereas, the business covered and licensed by the Act is not now paying an adequate license tax, and, whereas, liquor in bonded storage is being removed from the bonded warehouses and disposed of without the receipt by the state of adequate license tax, "an emergency is hereby declared to exist, and this act shall take effect from and after the date of its passage and approval by the Governor."

The plaintiff, which is an Ohio corporation, in October, 1916, purchased from the distiller warehouse receipts covering 9,800 proof gallons of whiskey, original gauge, and upon the purchase of these certificates, became and remained the owner of this whiskey which continued in the distiller's bonded warehouse until January, 1920, when it was transferred to a bonded warehouse operated by the Louisville Public Warehouse Company. Thereby, the plaintiff has had, and it has, such constructive possession of the whiskey as the federal laws contemplate before the federal tax is paid. In April, 1920, plaintiff desired to have this liquor transferred, under the existing federal regulations which permit such transfer, to another bonded warehouse in the state of Massachusetts, and directed the Louisville Public Warehouse Company to proceed with such transfer, at the same time tendering payment to the Warehouse Company of all storage charges, *ad valorem* taxes, and all other payments at-

tending such transfer and claimed to be proper, excepting the fifty cents license fee under the Act of 1920. The Warehouse Company refused to permit such withdrawal and transfer, for the sole reason that the fifty cent tax had not been paid, and claimed a lien upon the whiskey to secure such payment.

Thereupon, plaintiff filed this bill against the Warehouse Company and against the State Auditor and the State Attorney General, alleging that the Warehouse Company was unlawfully refusing to make the transfer and that the state officers were threatening to enforce this law and the penalties thereof against plaintiff and the Warehouse Company, and asking that the Warehouse Company be enjoined from further refusing to make the transfer or from further asserting any lien for this fifty cent tax; that the state officers be enjoined from any step attempting to enforce the act or the lien thereof, and that the Attorney General be enjoined from instituting any action, civil or criminal, to coerce the payment of this tax, or to collect the penalties or fines prescribed in the act. A motion for preliminary injunction was made, and the District Judge, proceeding under Sec. 266 of the Judicial Code, caused the motion to be heard before the court as now constituted.

Several questions are involved, and it is not feasible to discuss all of them exhaustively. As to several of them, we state only our conclusions; as to some, we add the reasons which induce the conclusion.

1. *Jurisdiction of this court as a federal court.*

This is clear, first, because the bill shows diverse citizenship with more than \$3,000 involved in money values; and, second, because the bill states a case of rights arising

under the Fourteenth Amendment to the Federal Constitution. It is well-settled that, in the latter case, the federal court has jurisdiction if the claim of federal right is made in good faith and is not frivolous, even though in the end it may turn out to be erroneous.

2. *Case arising under Sec. 266 Judicial Code.*

Two state officers are made parties defendant, and an injunction is sought to prevent them from enforcing the law of the state, which law is said to be unconstitutional. The tax law does not seem to impose upon the auditor any duty of enforcement, nor is it clear that he can do anything which would be harmful enough to call for an advance prohibition. As to the attorney general, the case is different. While this statute does not require him to act, it seems to be understood by all parties, including the attorney general himself, that it is his official duty to enforce the law by bringing, on behalf of the state, all actions and by enforcing all penalties which the law provides for. The bill alleges that he intends to enforce these penalties, and he does not dispute this allegation. The matter has proceeded upon the assumption by the district judge of the district and by all parties, that the case is one contemplated by Sec. 266; and we see no reason to hesitate on this account.

3. *Abatement under Sec. 266.*

By the amendment of March 4th, 1913, it was provided by way of amendment to this section, that proceedings thereunder in any federal court should be stayed pending the determination of the question in the state courts, if

"a suit shall have been brought in a court of the state having jurisdiction thereof under the laws of the state to enforce such statute or order, accompanied by a stay in such state court of proceedings under such statute or order pending the determination of such suit by such state court."

The attorney general shows, by way of abatement or stay of the present application, that a suit has been brought by another owner of whiskey, in a situation analogous to that of plaintiff here, against another warehouseman, the purpose of the suit being to compel the delivery of the whiskey to the plaintiff, who had paid the government tax, and against which delivery the warehouseman was urging that it must collect the fifty cent tax under the law now in question. After the defendant had answered and set up this law and claimed that it ought to be entitled to keep the whiskey until the validity of the law was determined by some competent court, the plaintiff in that case filed an amended petition asking an injunction against the state auditor and the state attorney general to prevent them from enforcing this act; thereupon, an injunction issued in that suit enjoining them "from requiring from the plaintiff, or his agent or distiller in charge, payment of the fifty cent per gallon tax . . . until further orders of the court."

We pass by a serious question as to whether this injunction is valid, and, for present purposes, assume that it is. It does not present such a case as is contemplated by the amendment of March 4, 1913, to Sec. 266 of the Judicial Code. This is for two reasons: The first is that the state court which issued this injunction is not the state court contemplated by the amendment. The action of the federal court is to be superseded or suspended only in case—as we read the statute—"a suit to enforce such statute or order shall have been brought in a court of

the state having jurisdiction thereof under the laws of such state"; and while it is said that this particular state court has jurisdiction to enforce this law because it is the court in which the state might rightfully bring suit to collect penalties, it is entirely plain that the suit which has been brought was not brought to enforce this law. The attorney general would escape this conclusion by saying that the clause "to enforce such statute or order" is dependent upon and defines the word "court," and not the word "suit." This construction is not only—as it seems to us—awkward and unnatural, but it leaves the word "thereof" superfluous and without meaning, and leaves the word "suit" going at large without definition. According to this construction, if only the suit is brought in a court which has jurisdiction to enforce this law, it makes no difference what kind of a suit or what it is about.

The second reason why the amendment of March 4, 1913, does not apply is that it contemplates a stay which will protect against the enforcement of the law the plaintiff who, in the federal court, is seeking the injunction. It is manifest that the stay which only prohibits the attorney general from enforcing the law against another plaintiff in another case, cannot protect this plaintiff in this case, and Congress could not have intended to oust the jurisdiction of the federal courts, excepting where the state courts were providing an adequate substitute. The reasons assigned to Congress for the enactment of this amendment, as shown in the report of the House Judiciary Committee, February 27, 1913, Report No. 1584, indicate that it was intended to reach only those cases where the enforcement by the state was through a court action, brought by some administrative body, for specific performance of the law; but however that may be,

and if the amendment might be invoked when its application was based upon some other kind of an action for some other kind of enforcement of a law, there at least must be identity between the party claiming protection in the federal court and the party who is receiving protection in the state court.

Therefore, considering the papers filed by the attorney general on this subject as a plea in abatement, it must be overruled, and considering them as answers to plaintiff's motion for an injunction, they are insufficient.

4. *Jurisdiction of this court as a court of equity.*

Obviously, equity has no jurisdiction, except upon the theory that an injunction is necessary; and an injunction will not be awarded, if there is an adequate remedy at law. The vital question, then, is, "Is there an adequate remedy at law"?; and, to answer this in the affirmative, we must know what that remedy is.

(a) It is said that the tax may be paid under protest, and that, if the law turns out to be invalid, it will be the duty of the auditor to make a state warrant for repayment, and that this duty will be enforced by mandamus proceedings. If this remedy were clear and certain, it might be "adequate" (1); but its existence is at least doubtful. As a general rule, payment merely under protest, unless some statute expressly provides, is voluntary payment, and suit for recovery will not lie even if there is a defendant who can be sued. This taxing statute does not provide for payment under protest, and does not provide for suing the state to get the money back, even

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(1) *Dow v. Chicago*, 11 Wall. 108, 112;  
*Indiana Co. v. Koehne*, 188 U. S. 681;  
*Boise Co. v. Boise City*, 213 U. S. 276, 282;  
*Singer Co. v. Benedict*, 229 U. S. 481, 487.



if payment were made to release a levy and so were compulsory. The existence of this remedy can depend only on Sec. 162 of the Kentucky Statutes.

This section authorizes the refunding warrant in cases where a tax, which was paid, was "not due"; and a later clause makes reference to "the mistaken payment." In a broad sense, taxes which are invalid because the taxing act is unconstitutional, are "not due"; but the Kentucky Court of Appeals has not yet construed the statute as extending to such a case (2). It has been held not to reach cases where the assessment, made by some board or assessing officers, was invalid on account of their violation of law, and this holding has been put upon the ground that the auditor could not review the action of the assessing officers and determine its validity. On the other hand, cases where the question was whether a tax should be paid under one statute or under another or under both, have been held within the scope of the section. It has been at least strongly intimated that plaintiff cannot demand this warrant unless he paid the tax under the compulsion of distraint or a right of distraint and under a mistake of law or fact. Taxes paid merely under protest cannot be recovered without express provision of law, since mandamus will lie only to compel performance of a plain duty, and since, to require the Auditor, at his peril to determine the unconstitutionality of a legislative act, is to put upon him an extraordinary burden, we must have grave doubt whether this remedy exists. Certainly, the state of the Kentucky decisions does not justify us in saying it is so clear and effective as to be "adequate,"

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(2) *German v. Coulter*, 112 Ky. 577;  
*Louisville v. Coulter*, 112 Ky. 584;  
*Bosworth v. Metropolitan*, 162 Ky. 344;  
*Louisville v. Bosworth*, 169 Ky. 824;  
*Greene v. Taylor*, 184 Ky. 739;  
*Craig v. Security* (March 9, 1920).

in the sense of the fundamental equity requirement. Further, the remedy is by mandamus, a discretionary writ; the plaintiff is entitled to his adequate remedy in the federal court (*U. S. Life Ins. Co. v. Cable*, C. C. A. 7, 98 Fed. 761), and a federal court will mandamus a state officer only in the clearest case. It seems a paradox that a court should refuse an injunction and thus permit an act to be done, and then issue a mandamus to compel its undoing.

(b) Another suggested remedy is that the plaintiff pay the Warehouse Company the tax and immediately sue to recover it back. As to this, it could be answered, first, that a lien given by an unconstitutional law is no lien, and, hence, payment by plaintiff, in order to get possession of his property, would not be compelled by the lien, would be voluntary and suit to recover it back would be defeated for that reason. (3) It could be answered, second, that as soon as the first day of the next month arrived and the Warehouse Company did not pay the tax over to the State, penalties would accrue against the warehouse company at the minimum rate of \$500 per day, and the pendency of the law suit would be no defense against those penalties. Further, plaintiff, in case of failure, would be liable, perhaps directly to the State, for the same penalties, and at least liable over to the warehouse company for their amount. Still further, the warehouseman's personal responsibility may be insufficient.

(c) The same matter of accruing penalties applies to an action of replevin against the warehouseman, after tender of valid charges and claims—if that action would otherwise be appropriate under the Kentucky practice.

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(3) We assume that, if the law is valid, there is a lien effective against the withdrawing owner, though that is not clear. See *infra*.

No one of these suggested remedies accompanied by such contingencies is "adequate" (*Davis v. Wakelee*, 156 U. S. 680, 688; *Walla Walla v. Walla Walla Co.*, 172 U. S. 1, 12; *Union Pacific Co. v. Weld*, 247 U. S. 282, 285).

5. *If the plaintiff is right upon the merits, is there that imminent irreparable injury which alone justifies a preliminary injunction?*

This is, in part, the same question as to whether there is an adequate remedy, but it goes further.

It is not to be doubted that the extravagant and oppressive penalties which accumulate under the law, so that no one could ever refuse payment during the length of time necessary to carry through a test suit, demonstrate irreparable injury under the rule of *Ex parte Young*, 209 U. S. 123, and similar cases, except for two considerations which are said to distinguish.

The first is that this section of the statute imposing these penalties may be considered as separable, and, if obnoxious to controlling principles, may be considered as invalid without affecting the rest of the law—whereby a suit for penalties could be defeated. In advance of a decision by the Kentucky courts, we cannot be assured that this provision is separable. It is the only effective means which the state has for enforcing the law and collecting the tax. We cannot see that the state has any compelling lien. Taxes are not payable until the first of the month after the liquor is withdrawn from the warehouse, and when the liquor is so withdrawn and removed from the state, as the statute contemplates, no effective lien in favor of the state can remain. In those cases where the warehouseman owns the liquor, the purported lien thereon is plainly ineffective in the tax collection.

The effect of the statute might be such, if some difficulties of construction are overlooked, as to give the warehouseman a lien and compel the payment of the tax to pay him before he surrenders the liquor to the owner, but this would not help the state any in collecting from the warehouseman; it would have no weapon, except the penalties, and a lien upon the warehouse which might be of little comparative value.

When we compare the Act of 1920 with that of 1917, we find that the earlier one provided that the Auditor should bring suit to collect the tax, with an eight per cent penalty and with all other interest and penalties provided for delinquent taxes in other cases. The revisers omitted these provisions and substituted only the declaration in Sec. 5 that each day of default shall be a separate offense. The legislative intent to regard this extreme penalty as essential is fairly clear. At least, we cannot presume that the Kentucky Legislature would have regarded this statute as sufficient and effective, without the penalty section, and, in that situation, we cannot pronounce that section separable.

The second distinguishing consideration is that no penalties accrue unless the owner withdraws his liquor, and thus, there is no irreparable injury unless the owner brings it on himself. Ordinarily, a tax becomes due at a fixed date, and thereafter, the penalties against the nonpaying owner accrue in spite of anything he can do.

In this case, as we later construe the act, nothing accrues until the owner makes the first move; and, hence, there is superficial force in the consideration urged, but only superficial. It is to say that it is no injury to a property owner to put an intolerable burden upon a certain use by him of his property, because he may, if he will, refrain from that use. This can not lessen the property-

owner's right to complain of the burden, when the effect is upon any rightfully contemplated use of his property; much more must this be true when the effect is upon the only substantial use which he can make of it; and thus we observe another form of the proposition, later discussed, that the withdrawal of whiskey from the warehouse is not a mere privilege. Plaintiff now desires to ship his whiskey to Massachusetts; to do so is, normally, his absolute right; that may be a better sale market or a better storage place. He says that he wishes to bottle, to save the heavy "outage" incident to the expected long storage, and that this is not allowed at defendant's warehouse, but the facilities which he wishes to use are in Massachusetts; to forbid him to make the best rightful use of his property, is, in fact, to deprive him of his property; and it is no answer to say that postponement of the right is his only injury. There is no visible end to the postponement. He can never test the question in any other way than by this case, until he pays the tax and takes the chance of getting it back; every other owner is in the same position; and if each must wait for some other owner to determine the question, the supposed test case can never start. In the meantime, leakage, evaporation, storage charges and regular taxes eat up—or drink up—the property.

We think the injury is correctly to be called irreparable; and it is not only imminent, it is present.

6. *The alleged discrimination against Kentucky holders.*

We do not see that plaintiff is deprived of the equal protection of the laws, merely because those who own and store whiskey in other states may not have to pay this

tax or an equivalent one, and, therefore, can take the market away from plaintiff. The Fourteenth Amendment cannot insure that each state shall have a taxing system equivalent to that of every other.

Nor are we prepared to say that the statute depends upon a classification, among those who own property in Kentucky, so arbitrary as to be violative of the "equal protection" clause of the Fourteenth Amendment. We do not understand that to impose an otherwise proper license or excise tax upon a privilege with regard to one class of property has ever been thought unlawfully discriminatory for the sole reason that similar privileges as to other classes of property were not similarly taxed; nor can it be thought that it is merely and wholly arbitrary to put a license privilege as to whiskey in bond in a class by itself.

*7. Is there lack of due process of law?*

This is only another form of stating the ultimate question. If the law is invalid for any of the reasons alleged, it is obvious that to enforce collection of the tax is to take the plaintiff's property without due process; hence, we proceed to the reasons alleged.

*8. Is the entire law invalid because of the excessive penalties.*

The penalties are plainly oppressive—lacking any provision for opportunity to test the law. Giving to plaintiff's property a net value of \$1 per gallon (\$1.50 less the tax), and taking every day's delay to pay the tax as a separate offense, the property would be exhausted by the minimum penalties before it was time to

put in an answer to any test suit. This arbitrary character further appears because the fines for willful refusal to pay on 10,000 gallons *cannot* be more than twice as much as they *must* be for the careless neglect to pay on one gallon. We do not see that they are in substance less objectionable than those denounced in *Ex parte Young*, *supra*, see pp. 145-7; and we have already stated our reasons for thinking that the penalty section was inseparable and that the law would not have been passed without it or some substitute for it. Since it is apparent that there rise questions of law and of fact upon which the owner is entitled to have a judicial inquiry, it would seem that this section makes the whole law invalid; but this point is not expressly made in the bill of complaint, though perhaps included within some general terms therein used, it has not been argued by counsel, and we prefer not to rest our decision upon it, but only to refer to it as confirming us in the conclusion later reached.

9. *Had the Kentucky Legislature power to levy such a tax?*

Taxation is of three kinds: upon persons, upon property and upon excises. This is plainly not a capitation tax. The Kentucky Constitution requires that property taxes shall be levied *pro rata* upon all property, and it is conceded that this particular tax can not be sustained as a property tax. That leaves for consideration only excise taxes.

The Kentucky Constitution gives the legislature power to "provide for license fees on . . . occupations," and this statute declares that it levies an occupation tax. So far as it is levied upon the occupation of

manufacturing whiskey, it is within the ordinary definitions and pursuant to the long-settled policy of Kentucky; but so far as it seeks to mark out a separate and distinct occupation or business, the owning and storing and withdrawing of untaxpaid whiskey, it seems to involve a previously unheard of "occupation," and one which, as applied to this subject, is very difficult to distinguish from the occupation of owning property. However, it is unnecessary to rest any conclusion upon a matter of definition. If the statute is a valid exercise of power under any constitutional grant, it ought not to be condemned merely because it adopted a wrong name for itself.

The same clause of the constitution which provides for license taxes for occupations, continues, "or a special or excise tax." There seems no reason to think that the allowable "special" tax was intended to cover a discriminatory property tax or refers to anything which is not fairly to be defined as an excise tax. The ultimate question, therefore, is whether this statute imposes a valid excise tax.

We first meet the problem whether the law intends to impose a tax of fifty cents per gallon per year so long as the business of storing whiskey in bond is continued, or, rather, intends to impose only one fifty cent tax, regardless of the period of storage. In favor of the first view, it is to be noted that the first section expressly declares the tax to be an "annual" one, that, save for changing the definition of the business taxed, the insertion of the word "annual" formed the only change made by the revisers, as compared with Sec. 1 of the Act of 1917, that the Act speaks of "taxes" as though contemplating a plural, and that, although nothing is payable until withdrawal, it would be possible at that time to compute the



tax as having been an annual one accruing year by year up to that date. In favor of the opposite view, it is to be seen that no tax is payable until after a withdrawal or transfer, and that there are express provisions fixing the amount to be paid whenever that time arrives at the sum of fifty cents per gallon. It may be that these conflicting provisions make the statute so unintelligible that it is invalid for that reason, or it may be that it ought to be construed according to the first view. In either of these events, that would be the end of this controversy, since it is entirely clear, and the Attorney General admits, that an annually accruing tax of this amount would be confiscatory and invalid. The Attorney General insists that the latter view above specified is the proper one, and says that this is the view which has been and will be taken by the state officers in enforcing the law. Doubtless he cannot by his position at this time, bind the Kentucky courts as to their ultimate decision of this question; but, for the further discussion of the matters before us, we assume—without deciding—that he is right and that only one fifty cent tax will ever accrue.

It is no objection to the validity of a tax as an excise that it is payable only upon the happening of an event, or that it is measured by the amount of property which that event affects. This principle is illustrated by *Raydure v. Board*, 183 Ky. 84, sustaining the validity of an excise tax upon the output of oil wells.

The objection to this tax goes deeper. It provides, in effect, that the owner of property situate in Kentucky and who has not embarked that property in any business carried on in Kentucky, may not have his property, for sale or use or to carry into some other state, until he has paid a special tax upon it of a half or a third of its value

in addition to all other ordinary and regular taxes. When this law was passed and given immediate effect, there were supposed to be 30,000,000 gallons of whiskey in store in bond in the state. Upon this, the owners had paid the regular *ad valorem* tax every year, and had paid or were liable to pay the regular excise tax of two cents per gallon imposed upon the business of manufacture. Upon no principle can the mere allowing of this property to remain in existence, in the only form in which the federal laws allowed it to remain, be considered as a privilege which the legislature might make conditional upon the payment of a tax for revenue—which depends upon different principles than does a regulatory or inspection tax under the police power. It is true that the quality somewhat changes with age, and it is not inconceivable that a revenue excise tax might rightly be imposed upon the business of storing whiskey for aging purposes, in effect as a branch of the manufacturing business; but it would be distorting this law to attribute to it that purpose. This tax is imposed, not upon the business of storing, but upon the single business of "owning and storing \* \* \* and in removing"; the tax is the same whether the storage has been for one day or for a period of years; upon the defendants' construction, which we are now assuming; out of several successive owners of warehouse receipts, who would thus engage in the storing business, all but the last one go free; the thing really taxed is the act of the owner in taking his property out of storage into his own possession (absolute or qualified) for the purpose of making some one of the only uses of which it is capable, i. e., consumption, sale or keeping it for future consumption or sale. We cannot escape the conviction that it was the real purpose of those who

drafted this law to levy a substantial tax upon this great body of property, as property, and that the form of an occupation or excise tax was adopted in order that an object might be accomplished which the Kentucky Constitution forbade. It is a property tax in the clothes of an excise. The whole value of the whiskey depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value. Chief Justice Marshall said in *Brown v. Maryland*, 12 Wheat. 419, 444, "All must perceive that a tax on the sale of an article imported only for sale is a tax on the article itself."

In reaching this conclusion, we must give great weight to the fact that the formerly existing law placed an excise tax of two cents per gallon upon the entire combination business of manufacturing, with its incidental storing and withdrawing. This was the legislature's idea of a proper excise tax. After the prohibition amendment and laws had practically stopped the business of manufacturing, and, in common supposition, destroyed the great part of the market for whiskey in bond, the legislature repealed the two cent law and substituted this so-called excise tax of fifty cents, which was to be applied to the mere withdrawal, wholly disconnected from manufacture. If the new tax were to be truly an excise, the circumstances suggested a diminution of the old, rather than an increase of 2500 per cent.

Another special consideration tends to persuade to the same end. An excise or occupation tax, ordinarily, is imposed not merely upon a privilege which the legislature may grant or withhold, but upon a privilege which the prospective taxpayer may accept or decline. Not so here. The owners of whiskey in bond in Kentucky, when this law was passed, could not refuse to engage in the

business of storing it in Kentucky, if they did not wish to pay the tax. The law was given immediate effect, to the effect that and in order that they could not decline; like the Ancient Mariner's audience, they "can not choose but" stay; and in substance it was declared that they became, on that day, subject to pay a tax on account of the business which they had already done, but which, if it were a business, had been free from this tax until that moment.

The principles which limit the definition of a permissible excise tax are discussed in the familiar text books and digests, and, among many instances, by Chief Justice Fuller, in *Pollock v. Farmers' Co.*, 157 U. S. 429, 580, *et seq.*, and by Judge O'Rear, for the Kentucky Court of Appeals, in *Standard Oil Co. v. Commonwealth*, 119 Ky. 75, 79-81. The controlling proposition is that the mere right to own and hold property cannot be made the subject of excises. The principle has been applied, for example, to the mere owning of timber (*Thompson v. Kreuter*, 112 Miss. 165) and to devoting it to a turpentine orchard, the use for which it was most available (*Thompson v. McLeod*, 112 Miss. 383. See the discussion of principles and authorities in these two Mississippi cases). The Corporation Tax Cases (*Zoune v. Minneapolis*, 220 U. S. 187, 191; *McCoach v. Minnehill*, 228 U. S. 295, 302; *U. S. v. Emery*, 237 U. S. 28, 32) are analogous. Plaintiff's acts, like those of the Emery corporation, were "limited to the necessary incidents" of ownership. True, in these cases, the court was trying to find the legislative intent in using the phrase "doing business," and here, we are concerned with the legislative power, but we understand that such power, in this case, rests upon being "engaged in business"; and thus the two questions come to be the same.

We do not necessarily decide the question whether the tax might be good as an excise as applied to whiskey made after the law was passed. Since no license tax is distinctly imposed on manufacturing such whiskey as goes into bond, it might be claimed, with more or less force, that the making, storing and withdrawing was one connected business, the license tax burden being pending until it attached upon the culminating act, the withdrawal. Nothing is now involved except whiskey which had been made and had gone into storage before March 12; and the business or occupation which justifies the excise must be found in what happened since.

10. *Is the tax confiscatory?*

The mere fact that an excise tax, levied under the revenue power, operates practically to prohibit the business taxed, has been held not to make the law invalid when an act of Congress was under consideration (*McCray v. U. S.*, 195 U. S. 27, 51), but the power of the Kentucky Legislature under the Kentucky Constitution is more limited. The Attorney General concedes that a tax which operates to prohibit the conduct of an otherwise lawful business is invalid; the plaintiff contends that this invalidity results when the burden, although not completely prohibitive, is so heavy as to take a large part of the profits of the property. While some of the Kentucky cases invalidate excise taxes because prohibitive, yet they do not necessarily depend for their result, upon the substantially complete prohibition which existed in those particular cases. Other decisions seem to support the plaintiff's contention. In *Owen County v. Cox*, 132 Ky. 738, it was found that the license tax upon the occupation of operating a four-horse dray was such that the owner "could

make little, if anything, more than the amount of the tax." In *Louisville v. Pooley*, 136 Ky. 286, the holding was that a license tax which took respectively from 25 to 100 per cent of the net earnings of those engaged in a business was so far prohibitive as to be beyond the power of the legislature. In *Sallsbury v. Equitable Co.*, 177 Ky. 348, a license tax which was found to amount to one-third of the net earnings of the largest business of the class was considered unreasonable, confiscatory and prohibitive. A number of similar cases are reviewed, and an injunction against the tax was sustained.

Many excise taxes that, as against other business, would seem arbitrary and oppressive, have been sustained as against the liquor business because of its character, but these cases have generally if not always involved the exercise of the police power; the present case involves only a tax for revenue. It is further to be noted both that the mere owning of whiskey and the withdrawing of it from bond has not been held to be a business obnoxious to any public policy, and also, that the recent constitutional and statutory prohibitions of intoxicating liquors as a beverage have gone far to remove the burden of public reprobation from that owning and dealing which the law still permits.

It is plaintiff's contention that, since whiskey in bond can be dealt in only through warehouse receipts, the plaintiff if engaged in any business, is engaged in the purchase and sale of these certificates (although not in Kentucky) with the prospect of making, at the best, only a few cents per gallon, and that the imposition of this tax destroys all of the profits which the average dealer in certificates can make. We do not see that plaintiff is in any better position than his vendor, mediate or immediate, who was the manufacturer, would have been, and

the real question is whether one who had manufactured whiskey and who had it on hand in bond when this law was passed, can complain of the tax as confiscatory.

Considerable proof has been taken by both parties as to the value of whiskey in bond, in order to show what fraction of that value has been taken by the tax. In finding the facts upon that subject which rightfully bear upon this motion, we should give the benefit of reasonable doubts to the state, since the unconstitutionality of the act should clearly appear before there can be an injunction; nor can we consider as controlling the peculiar values which special brands may have on account of special reputation, nor treat the plaintiff in this case any better or any worse than the average of his class; because, with such a question, his peculiar hardships will not avail him nor will his special lack of equity sustain the law. Defendant has proof tending to show that some sales to the retailer of tax paid whiskey are being made at a figure which seems to leave two dollars per gallon for the in bond owner, and that, after deducting cost and expenses and this fifty cent tax, there will be a good profit to the manufacturer. We think these instances are rather exceptional and the computation of costs omits important items. The market price, the regular selling price, of warehouse receipts is the true criterion, because in no other way is whiskey in bond bought and sold.

Plaintiff claims this value is not more than one dollar. Defendant claims it to be a dollar and a half. The facts seem to be that, early in 1920, the general price throughout the country was somewhat less than one dollar; that the imposition of this Kentucky tax tended to depress the price of that stored in Kentucky and to advance that stored elsewhere; that market conditions at about the time of and since the passage of the act, have also tended

to increase the price; and that the present market price of certificates for whiskey in bond, in Kentucky, is about one dollar, and that of certificates for storage elsewhere about one dollar and a half. It is obviously true that if the fifty cent tax were paid by all holders of Kentucky storage, they could not add that amount to their price, because the same act would double the quantity available for the market and depress the price. We think it can fairly be assumed that within a short period after the act was passed and when it began to take substantial effect, whiskies in bond, in Kentucky, as a class, would have been worth about \$1.25, if it were not for this law, and that the tax, therefore, should be considered as taking about forty per cent of that value, and a very large part, if not all, of the normal profits of the manufacturing and storing business (6).

We have said that this tax was not discriminatory merely because whiskey outside of Kentucky is not reached; but this situation has a bearing on the question whether the tax is so oppressive as to be prohibitive under the Kentucky rule. When the federal government imposes an excise tax on whiskey, it operates alike upon the manufacturers and owners throughout the country; all can add the tax to their price, and no manufacturer suffers save from the indirect result of a possibly less consumption. It is otherwise, when a forty per cent tax is laid upon the manufacturers of one state only and their market is a national market. If they add the tax to their selling price, they are out of business, so far as competitive standards control.

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(6) On the question of value, it is not irrelevant that a state board, charged with the duty of assessing at the true value for *ad valorem* taxation, values whiskey in bond at fifty cents per gallon.



In view of these facts, and the Kentucky decisions, we believe this tax to be so prohibitive as to be in violation of the Kentucky constitution.

11. Our conclusion that the tax is invalid is subject to review. No action ought to be permitted by either party, which would make that review unavailable. We think the practical way to prevent the injury to plaintiff arising from perhaps a long suspension of his right to take and have his property free from unlawful burden, and yet to preserve the tax to the state if it shall eventually be found valid, is to provide that the injunction which will permit the plaintiff to take his property out of the state without paying the tax shall be conditional upon the giving of a bond by him. The bond will run to the Commonwealth of Kentucky; it will be in the penalty of \$8,000, approximately double the amount of the tax; it will be subject to approval, both as to form and as to sufficiency of surety or sureties, by the clerk of this court, after notice to the Attorney General of the application for approval; it will be filed with the clerk and be retained by him until it shall hereafter be ordered by the court either to be cancelled or to be delivered to the Commonwealth for suit; and it will be conditioned that the plaintiff pay, or cause to be paid, a tax of fifty cents upon each proof gallon taken, or caused to be removed, under protection of the injunction, without payment of the tax—such payment to be made if and when it shall be finally decided in this cause that the tax is valid and should have been paid, or if and when this cause shall finally fail and be dismissed for any reason.

12. We are informed that other owners of warehouse receipts, situated similarly to plaintiff, desire to, and will, bring similar suits. We think it proper that each such owner should be allowed to intervene in this suit, if

plaintiff does not object, or, lacking intervention, that each such suit should be consolidated with this for the general purposes of hearing and trial. It is clear that the right of each intervenor or plaintiff to an injunction will be the same as the right of the plaintiff here, unless by reason of some special circumstance. We think the substance and the spirit of Sec. 266 have been met by the hearing which has now been had upon this subject before the court of three judges convened under that section, and that it is not necessary to have a further hearing before such special court upon each application for injunction made by any such intervenor or other plaintiff. We therefore approve the issue of preliminary injunction by the District Judge to any such intervenor or plaintiff whose case appears to such District Judge not to be essentially distinguishable from that of this plaintiff, such injunction to be upon the same terms and conditions as prescribed herein.

13. What we have said disposes of the motion for injunction and of the matters urged merely in opposition. The defendant Warehouse Company and the defendants Auditor and Attorney General have filed motions to dismiss. If these were to be granted, they would result in a final decree. We think the court, as now constituted, has no jurisdiction to make a final decree, but is called into existence for the sole purpose of hearing and deciding the motion for a preliminary injunction. Of course, if we have no power to sustain the motions to dismiss, we have no power to deny them. Accordingly, they will stand for hearing before the District Judge in the due course of procedure.

We are aware that upon appeals from orders made under Sec. 266, the Supreme Court has not noticed the distinction between the power to decide the motion for

injunction and to make final disposition of the cause, but we know of no express or necessarily implied ruling on the subject. There are some practical reasons for thinking that the court, thus constituted, ought to retain jurisdiction of the whole case until the end; but we cannot find this power in the statute.

A. C. DENISON,

*Circuit Judge.*

WALTER EVANS,

J. E. SATER,

*District Judges.*

May 31, 1920.

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**Order Granting Preliminary Injunction—Entered**  
May 31, 1920.

In this cause, the motion of plaintiff for a preliminary injunction was considered by the District Judge of the District to require hearing pursuant to Section 266 of the Judicial Code. Thereupon, he called to his assistance Circuit Judge A. C. Denison and District Judge John E. Sater, notice of the motion was given as required by Section 266 and the motion was argued and submitted to the three judges, all as recited in the order of submission dated May 14th, 1920. The three judges, having considered such motion and arguments and the affidavits then filed and the proofs before the Special Master since taken and filed, and having this day filed herein their opinion in writing, signed by all of them, and having directed the entry of this order by their unanimous approval endorsed on the draft thereof filed with the clerk.

It is therefore ordered:

1. The motions of the defendant Warehouse Company and of the defendants Auditor and Attorney General, to dismiss the bill, are continued for disposition in due course by the court, as held by the District Judge.

2. That, until the further order of the court, as constituted under Section 266, the defendant Louisville Public Warehouse Company refrain and desist from asserting any lien by virtue of the Act of March 12, 1920, upon the plaintiff's whiskey described in the bill and from refusing to co-operate in transporting such whiskey to any other bonded warehouse upon plaintiff's request, upon the performance by plaintiff of all conditions required by the laws of the United States or Kentucky, except those required by such Act of March 12; the defendant, John J. Craig, Auditor of Public Accounts, refrain and desist from demanding in any manner the report, upon the removal of such whiskey, contemplated by such Act, and from asserting against such whiskey or against such Warehouse Company on account of such whiskey any lien under such Act, and the defendant, Charles I. Dawson, Attorney General, desist and refrain from instituting any action or proceeding in equity or at law or procuring any indictment or warrant to coerce the payment by plaintiff or by the Warehouse Company of the tax specified in such Act upon plaintiff's whiskey described in the bill, or to enforce against either any penalty or fine prescribed by such act.

3. That writs of temporary injunction issue accordingly.

4. That the taking effect of this order of injunction and the issue of such writ be upon the condition precedent that plaintiff file with the clerk of this court a bond to the Commonwealth of Kentucky in the penalty of eight thousand dollars to be approved both as to form and as

to sufficiency of the surety or sureties by the clerk, after notice to the Attorney General of application for approval, and to be retained by him until it shall hereafter be ordered by the court either to be cancelled or to be delivered to the Commonwealth for suit, and to be conditioned that the plaintiff pay, or cause to be paid, the tax of fifty cents upon each proof gallon taken, or caused to be removed, under protection of the injunction in this cause, without payment of the tax, such payment to be made if and when it shall be finally decided in this cause that the tax is valid and should have been paid, or if and when this cause shall finally fail and be dismissed for any reason.

5. That, upon the filing of any intervening petition against the defendants or any other owner of warehouse receipts, or upon the consolidation with this action for trial and hearing of any other case determined by the District Judge to be suitable for consolidation, and when it appears to the District Judge that the issues are substantially the same as those involved herein and are substantially covered by such opinion in writing filed herein by the three judges, the District Court, held by such District Judge, may order and issue, in each such intervention or case, an injunction similar and upon conditions precedent similar, to those specified herein.

A. C. DENISON,

*Circuit Judge.*

WALTER EVANS,

J. F. SATER,

*District Judges.*

**Petition for Appeal**—Filed June 24, 1920.

The defendants, Louisville Public Warehouse Company, John J. Craig, Auditor of the State of Kentucky, and Charles I. Dawson, Attorney General of the Commonwealth of Kentucky, respectfully represent to the Court that they are, and that each of them is, aggrieved by the decree entered in this case on May 31, 1920, for the reasons set forth in the assignment of errors hereto attached.

WHEREFORE, defendants pray for an appeal to the Supreme Court of the United States, to the end that said decree may be reviewed, and, if found erroneous, reversed.

CHAS. I. DAWSON,  
*Attorney General of the State of  
Kentucky.*

WM. OVERTON HARRIS,  
*Attorney for Louisville Public  
Warehouse Co.*

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**Assignment of Errors**—Filed June 24, 1920.

The defendants, Louisville Public Warehouse Company, John J. Craig, Auditor of the State of Kentucky, and Charles I. Dawson, Attorney General of the Commonwealth of Kentucky, file this, their Assignment of Errors, to-wit:

1. The Court erred in granting the interlocutory injunction herein.
2. The Court erred in holding that the Act of the General Assembly of the State of Kentucky, approved

March 12, 1920, and attacked in the bill, is unconstitutional and violative of the Kentucky Constitution, and especially in holding: (a) That the said Act of March 12, 1920, is void because of excessive penalties imposed for the violation thereof; (b) that the said Act of March 12, 1920, is not a license or excise tax, but a property tax; and (c) that the act is confiscatory and violative of the Constitution of Kentucky.

3. The Court erred in refusing to stay proceedings herein pending the determination of the suit brought in the State Court.

4. The Court erred in holding: (a) That equity has jurisdiction, and that there was no adequate remedy at law; (b) that imminent irreparable injury was threatened, which justified the issuance of the interlocutory injunction; and (c) that to enforce the collection of the tax would result in taking plaintiff's property without due process of law.

5. The Court erred in refusing to sustain defendants' motion to dismiss the bill in equity.

CHAS. I. DAWSON,  
*Attorney General of the Commonwealth of Kentucky.*  
*Counsel for Defendants.*

WM. OVERTON HARRIS,  
*Attorney for Louisville Public Warehouse Co.*

**Order Granting Appeal**—Entered June 24, 1920.

This day came the defendants, by counsel, and presented their Assignment of Errors, appeal bond and petition for appeal, praying for an appeal to the Supreme Court of the United States from the decree entered herein on May 31, 1920, granting an interlocutory injunction; and it is thereupon ordered that the appeal bond be and the same is hereby approved; that the Assignment of Errors, appeal bond and petition for appeal be and the same are hereby filed, and that the appeal to the Supreme Court of the United States be and the same is hereby granted.

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**Bond on Appeal**—Filed June 24, 1920.

KNOW ALL MEN BY THESE PRESENTS: That we, Louisville Public Warehouse Company, John J. Craig (Auditor of the State of Kentucky), and Charles I. Dawson (Attorney General of the Commonwealth of Kentucky), as principals, and W. T. Fowler, as surety, are held and firmly bound unto The J. & A. Freiburg Company in the sum of Five Hundred (\$500.00) Dollars, lawful money of the United States, to be paid to them and their respective executors, administrators and successors; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors and administrators by these presents.

Sealed with our seals and dated this 22nd day of June, 1920.

WHEREAS the above named Louisville Public Warehouse Company, John J. Craig (Auditor of the State of Kentucky) and Charles I. Dawson (Attorney General of



the Commonwealth of Kentucky) have prosecuted an appeal to the Supreme Court of the United States to reverse the judgment of the District Court for the Western District of Kentucky, in the above entitled cause;

NOW, THEREFORE, the condition of this obligation is such that if the above-named Louisville Public Warehouse Company, John J. Craig (Auditor of the State of Kentucky) and Charles I. Dawson (Attorney General of the Commonwealth of Kentucky) shall prosecute their said appeal to effect and answer all costs if they fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

LOUISVILLE PUBLIC WAREHOUSE CO.,

By WM. OVERTON HARRIS, *Atty.*

JOHN J. CRAIG,

CHAR. I. DAWSON,

W. T. FOWLER.

STATE OF KENTUCKY,  
COUNTY OF FRANKLIN.

Affiant, W. T. Fowler, states that he signed the foregoing bond as surety for the purposes set forth in said bond, and that he is worth in excess of the sum of One Thousand Dollars (\$1,000.00) over and above his just debts and legal liabilities in property which is subject to execution.

W. T. FOWLER.

Subscribed and sworn to before me by W. T. Fowler,  
this 22nd day of June, 1920.

My commission expires May 20, 1924.

(SEAL)

ADDIE BRUMFIELD,  
Notary Public Franklin Co., Ky.

*Stipulation as to Record*

The above bond is approved, both as to sufficiency and form. This 24th day of June, 1920.

WALTER EVANS,  
*Judge District Court of the United  
States for the Western District  
of Kentucky.*

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*Stipulation as to Record—Filed June 24, 1920.*

It is stipulated and agreed between the parties to this action that, for the purpose of taking an appeal from the order of the court granting an interlocutory injunction in this case, the Clerk will copy the entire record in the case save and except the repetition of the caption to the various affidavits and the jurats thereto, and the summonses and various notices filed herein, and the returns thereon; and this stipulation shall be treated as the praecipe in this case.

TRADUE, DOOLAN, HELM & HELM,  
*Counsel for Plaintiff.*

CHAR. I. DAWSON,  
*Counsel for Defendants,*

JOHN J. CRAIG, AND

CHARLES I. DAWSON,

WM. OVERTON HARRIS,

*Counsel for Defendant,  
Louisville Public Warehouse Company.*

**Stipulation Waiving Citation**—Filed June 24, 1920.

The plaintiff, The J. & A. Frieburg Company, waives citation and service thereof in this case, and enter their appearance on appeal of this case to the Supreme Court of the United States.

THE J. & A. FRIEBURG CO.,  
By LEVI COOKE,  
TRABUE, DOOLAN, HELM & HELM,  
*Counsel for Plaintiff.*

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**Clerk's Certificate.**

UNITED STATES OF AMERICA, }  
WESTERN DISTRICT OF KENTUCKY. } SS.

I, A. G. RONALD, Clerk of the District Court of the United States for the Western District of Kentucky, do hereby certify that the foregoing transcript consisting of 161 pages, constitutes a full, true and correct Transcript of the Record and proceedings had in said Court in a certain cause, being No. 77 in equity in said Court, in which The J. & A. Freiberg Company (Incorporated) is the Complainant, and Louisville Public Warehouse Company (a corporation), John J. Craig, Auditor of the State of Kentucky, and individually, and Charles I. Dawson, Attorney General of the Commonwealth of Kentucky, and individually, are the defendants, as the same appears of record and on file in said office, and copied herein pursuant to the Stipulation of counsel found on page 160 of this Record.

WITNESS my hand and the official seal of said Court this — day of July, 1920.

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CLERK.

JAMES D. MAHER,  
CLERK.

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 439.

---

CHARLES L. DAWSON, ATTORNEY GENERAL OF  
THE STATE OF KENTUCKY, ET AL., - - - *Appellants,*

vs.

KENTUCKY DISTILLERS & WAREHOUSE  
COMPANY, - - - - - *Appellee.*

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## MOTION TO ADVANCE.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE EASTERN DISTRICT OF KENTUCKY.

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CHAR. L. DAWSON,  
*Attorney General of the State of Kentucky,  
Council for Appellants.*

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 439.

CHARLES I. DAWSON, ATTORNEY GENERAL OF  
THE STATE OF KENTUCKY, ET AL., - - - *Appellants,*  
*vs.*

KENTUCKY DISTILLERIES & WAREHOUSE  
COMPANY, - - - - - *Appellee.*

**Motion to Advance.**

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE EASTERN DISTRICT OF KENTUCKY.

The appellants, Charles I. Dawson, *Attorney General of the State of Kentucky, et al.*, move that this cause be advanced for hearing at an early date, for the following reasons, to-wit:

1. The sole question involved is the constitutional-ity of a most important Revenue act of the State of Kentucky, adopted March 12, 1920, imposing a license tax upon distillers, etc., of 50 cents per gallon upon all whiskey withdrawn from bond or transported in bond out of the State.

2. The State of Kentucky is relying upon this tax for an important part of its revenue in carrying out internal improvements, and the injunctions below have prevented the collection of the tax and have largely interfered with the State's fiscal system.

3. As the tax must be collected monthly from a large number of persons involving a great deal of ac-counting, it is of interest, both to the State and to its citizens, that the matter be promptly settled so that each will know whether the tax must be taken into considera-tion in their financial arrangements.

CHAS. I. DAWSON,  
*Attorney General of the State of Kentucky,*  
*Counsel for Appellants.*

Service of the foregoing motion to advance is here-by acknowledged this 1st day of October, 1920.

WILLIAM MARSHALL BULLITT,  
*Counsel for Appellee.*

OCT 15 1920

JAMES D. MAHER;  
CLERK

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1920.

No. **582**

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CHARLES I. DAWSON, ATTORNEY GENERAL OF  
THE STATE OF KENTUCKY, ET AL., - - Appellants,

vs.

J. & A. FREIDBERG COMPANY, - - - Appellee.

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**MOTION TO ADVANCE.**

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE WESTERN DISTRICT OF KENTUCKY.

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CHAR. I. DAWSON,  
*Attorney General of the State of Kentucky,  
et al., Counsel for Appellants.*

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1920.

No. —.

---

CHARLES I. DAWSON, ATTORNEY GENERAL OF  
THE STATE OF KENTUCKY, ET AL., - - - *Appellants.*  
vs.

J. & A. FREIBERG COMPANY, - - - - - *Appellee.*

---

**Motion to Advance.**

---

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE WESTERN DISTRICT OF KENTUCKY.

---

The appellants, Charles I. Dawson, *Attorney General of the State of Kentucky, et al.*, move that this cause be advanced for hearing at an early date, for the following reasons, to-wit:

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2. The State of Kentucky is relying upon this tax for an important part of its revenue in carrying out internal improvements, and the injunctions below have prevented the collection of the tax and have largely interfered with the State's fiscal system.

3. As the tax must be collected monthly from a large number of persons involving a great deal of accounting, it is of interest, both to the State and to its citizens, that the matter be promptly settled so that each will know whether the tax must be taken into consideration in their financial arrangements.

CHAS. I. DAWSON,  
*Attorney General of the State of Kentucky,*  
*et al., Counsel for Appellants.*

Notice and service of the foregoing motion to advance which is to be made on October 11, 1920, is hereby acknowledged this 1st day of October, 1920.

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*Counsel for Appellee.*

FILE COPY

DEC 24 1920

JAMES D. MAHER,  
CLERK.

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1920.  
No. 439.

---

CHARLES I. DAWSON, Attorney General of the  
State of Kentucky, et al., - - - Appellants,

*versus*

KENTUCKY DISTILLERIES & WAREHOUSE  
COMPANY, - - - - - Appellee.

---

**BRIEF FOR APPELLANTS.**

---

CHAS. I. DAWSON,  
*Attorney General,*  
W. T. FOWLER,  
*Assistant Attorney General.*





# INDEX.

	PAGES
<b>STATEMENT</b> .....	1
<b>ASSIGNMENT OF ERRORS</b> .....	8
<b>ALLEGATIONS IN THE BILL NOT SUFFICIENT TO CONFER JURISDICTION ON A COURT OF EQUITY</b> .....	9
Judicial Code, Sec. 267 .....	10
Rule 25, Rules of Practice for Courts of Equity ..	10
<b>PLAINTIFF BELOW HAD AN ADEQUATE REM- EDY AT LAW</b> .....	10
Judicial Code, Sec. 267 .....	11
Dow v. City of Chicago, 11 Wall. 108, 20 L. Ed. 65 .....	11, 19
Indiana Mfg. Co. v. Koehne, 188 U. S. 681, 47 L. Ed. 651 .....	11, 20
Shelton v. Platt, 139 U. S. 591, 35 L. Ed. 273 .....	11, 22
Allen v. Pullman Palace Car Co., 139 U. S. 658, 35 L. Ed. 303 .....	11, 23, 31
Boise Artesian Hot & Cold Water Co. v. Boise City. 213 U. S. 276, 53 L. Ed. 796 .....	11, 24
Singer Sewing Machine Co. v. Benedict, 229 U. S. 481, 57 L. Ed. 1288 .....	11, 26
Arkansas Building & Loan Ass'n v. Madden, 175 U. S. 269, 444 L. Ed. 159 .....	11, 27, 32
Kentucky Statutes, Sections 162 and 163 .....	11-12

	PAGES
Greene, Auditor, v. Taylor, 184 Ky. 739 . . . .	12
Craig, Auditor, v. Security Producing & Refining Co., 189 Ky. 565 . . . . .	12
Craig, Auditor, v. Frankfort Distilling Co. (Ky.), decided Nov. 23, 1920 . . . . .	17
Ex Parte Young, 209 U. S. 123, 52 L. Ed. 714 . . . .	28
Union Pacific R. R. Co. v. Weld County, 247 U. S. 282 . . . . .	31
<b>THE PROCEEDING SHOULD HAVE BEEN ABATED . . . . .</b>	<b>32</b>
Judicial Code, Sec. 263 . . . . .	33
<b>THE TAX IMPOSED BY THE ACT IN QUESTION IS AN OCCUPATIONAL OR EXCISE TAX AND JUSTIFIED UNDER SECTION 181 OF THE CONSTITUTION OF KENTUCKY . .</b>	<b>34</b>
Constitution of Kentucky, Sec. 181 . . . . .	34
Act of 1917 (Kentucky) . . . . .	36
Brown-Forman Co. v. Kentucky, 217 U. S. 563, 54 L. Ed. 883 . . . . .	36
Greene, Auditor, v. Taylor & Sons, 184 Ky. 739 . .	36
Raydure v. Board of Supervisors of Estill County, 183 Ky. 84 . . . . .	36
American Mfg. Co. v. City of St. Louis, 250 U. S. 459 . . . . .	37
Locke v. City of New Orleans, 4 Wall. 172, 18 L. Ed. 334 . . . . .	40
League v. Texas, 184 U. S. 156, 46 L. Ed. 478 . . . .	40
Kentucky Union Co. v. Kentucky, 219 U. S. 140, 55 L. Ed. 137 . . . . .	40

	PAGES
Cooley on Taxation, 3rd Edition, Vol. 1, 492 . . . . .	40
Billings v. United States, 232 U. S. 261, 58 L. Ed. 596. . . . .	40
Female Academy v. Sutherland, 116 Ill. Rep. (Freeman) 375 . . . . .	42
Pennsylvania v. Bauerle, 143 Ill. Rep. 459 . . . . .	44
Greene v. Kentenia Coal Corporation, 175 Ky. 661 . . . . .	44

**THE ACT IN QUESTION DOES NOT VIOLATE  
SECTION 171 OF THE CONSTITUTION OF  
KENTUCKY . . . . . 47**

Constitution of Kentucky, Sec. 171 . . . . .	47
Hager, Auditor, v. Walker, 128 Ky. 1 . . . . .	47
Gordon v. City of Louisville, 138 Ky. 444 . . . . .	51
City of Louisville v. Sagalowski & Son, 136 Ky. 328 . . . . .	51
Strater Bros. Tobacco Co. v. Commonwealth, 117 Ky. 603 . . . . .	51
Weyman v. City of Newport, 153 Ky. 490 . . . . .	51

**DO THE PENALTIES FOR VIOLATION OF THE  
ACT IN QUESTION MAKE IT INVALID . . . 51**

St. Louis, I. M. & S. Railway Co. v. Williams, et al., 40 Supreme Court Rep. 71 . . . . .	52
Waddy v. Southern Railway Co., 235 U. S. 67, 59 L. Ed. 405 . . . . .	52
Gulf, Colorado & Sante Fe Railway Co. v. State of Texas, 246 U. S. 58, 62 L. Ed. 574 . . . . .	52

<b>THE TAX IMPOSED BY THE ACT DOES NOT PLACE SUCH A BURDEN ON INTERSTATE COMMERCE AS TO VIOLATE ARTICLE 1, SECTION 8, CLAUSE 3, OF THE CONSTITU- TION OF THE UNITED STATES</b> .....	54
--	----

Coe v. Errol, 116 U. S. 517, 29 L. Ed. 715 .....	55
--	----

Diamond Match Co. v. Village of Ontonagon, 188 U. S. 82, 47 L. Ed. 399 .....	57
---	----

American Mfg. Co. v. St. Louis, 250 U. S. 459 ....	59
--	----

Underwood Typewriter Co. v. Chamberland, 41 Su- preme Court Reporter, 45 .....	61
---	----

U. S. Glue Co. v. Oak Creek, 247 U. S. 321 .....	61
--	----

<b>THE LAW DOES NOT VIOLATE THE PROVI- SIONS OF TITLE II OF THE VOLSTEAD ACT</b> .....	61
--	----

Volstead Act, Title II .....	61
------------------------------	----

<b>APPENDIX</b> .....	64
-----------------------	----

## AUTHORITIES CITED.

	PAGES
Allen v. Pullman Palace Car Co., 139 U. S. 658, 35 L. Ed. 303 .....	11, 23, 31
Arkansas Building & Loan Ass'n v. Madden, 175 U. S. 269, 44 L. Ed. 159 .....	11, 27, 32
Act of 1917 ((Kentucky) .....	36
American Mfg. Co. v. City of St. Louis, 250 U. S. 459, .....	37, 59
Boise Artesian Hot & Cold Water Co. v. Boise City, 213 U. S. 276, 53 L. Ed. 796 .....	11, 24
Brown-Forman Co. v. Kentucky, 217 U. S. 563, 54 L. Ed. 883 .....	36
Billings v. United States, 232 U. S. 261, 58 L. Ed. 596 .....	40
Craig, Auditor, v. Security Producing & Refining Co., 189 Ky. 565 .....	12
Craig, Auditor, v. Frankfort Distilling Co. (Ky.) decided Nov. 23, 1920 .....	17
Constitution of Kentucky, Sec. 181 .....	34
Constitution of Kentucky, Sec. 171 .....	47
Cooley on Taxation, 3rd Edition, Vol. 1, 492 .....	40
City of Louisville v. Sagalowski & Son, 136 Ky. 328 .....	51
Coe v. Errol, 116 U. S. 517, 29 L. Ed. 715 .....	55
Dow v. City of Chicago, 11 Wall. 108, 20 L. Ed. 65 .....	11, 19
Diamond Match Co. v. Village of Ontonagon, 188 U. S. 82, 47 L. Ed. 399 .....	57
Ex Parte Young, 209 U. S. 123, 52 L. Ed. 714 .....	28
Female Academy v. Sutherland, 116 Ill. Rep. (Free-man) 375 .....	43
Greene, Auditor, v. Taylor, 184 Ky. 739 .....	12, 36
Greene v. Kentenia Coal Corporation, 175 U. S. 661 .....	44
Gordon v. City of Louisville, 138 Ky. 444 .....	51

Gulf, Colorado & Santa Fe R'y Co. v. State of Texas, 246 U. S. 58, 62 L. Ed. 574 .....	52
Hager, Auditor, v. Walker, 128 Ky. 1 .....	47
Indiana Mfg. Co. v. Koehne, 188 U. S. 681, 47 L. Ed., 651 .....	11, 20
Judicial Code, Sec. 267 .....	10, 11
Judicial Code, Sec. 266 .....	33
Kentucky Statutes, Sections 162 and 163 .....	11-12
Kentucky Union Co. v. Kentucky, 219 U. S. 140, 55 L. Ed. 137 .....	40
Locke v. City of New Orleans, 4 Wall. 172, 18 L. Ed. 334 .....	40
League v. Texas, 184 U. S. 156, 46 L. Ed. 478 .....	40
Pennsylvania v. Bauerle, 143 Ill. Rep. 459 .....	44
Raydure v. Board of Supervisors of Estill County, 183 Ky. 84 .....	36
Shelton v. Platt, 139 U. S. 591, 35 L. Ed. 273 .....	11, 22
Singer Sewing Machine Co. v. Benedict, 229 U. S. 481, 57 L. Ed. 1288 .....	11, 26
Strater Bros. Tobacco Co. v. Commonwealth, 117 Ky. 603 .....	51
St. Louis, I. M. & S. Railway Co. v. Williams, et al., 40 Supreme Court Rep. 71 .....	52
Union Pacific R. R. Co. v. Weld County, 247 U. S. 282 .....	31
Underwood Typewriter Co. v. Chamberland, 41 Su- preme Court Reporter, 45 .....	61
U. S. Glue Co. v. Oak Creek, 247 U. S. 321 .....	61
Volstead Act, Title II .....	61
Weyman v. City of Newport, 153 Ky. 490 .....	51
Waddy v. Southern Railway Co., 235 U. S. 67, 59 L. Ed. 405 .....	52

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1920.

No. 439.

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CHARLES L. DAWSON, ATTORNEY GENERAL  
OF THE STATE OF KENTUCKY, ET AL., *Appellants*,

*versus* **BRIEF FOR APPELLANTS.**

KENTUCKY DISTILLERIES & WAREHOUSE  
COMPANY, - - - - - *Appellee.*

---

**STATEMENT.**

At the regular 1920 Session of the General Assembly of the Commonwealth of Kentucky there was passed by the Assembly, and approved by the Governor on the 12th day of March, 1920, an act entitled:

"AN ACT imposing an annual license tax upon every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits known as whiskey or brandy or other species of double stamp spirits in this State, and upon every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in the State, and in removing same therefrom for the purpose of sale, or for any other purpose; providing for monthly reports by distilleries and bonded warehousemen, for the purpose of ascertaining the



amount of tax due; providing for monthly payments of the amount of license tax due; fixing a penalty for failure to make such monthly report and settlement; providing for the manner of distribution of the tax so collected; repealing all other license, franchise and excise taxes on the business covered by this act, and declaring an emergency to exist."

This act is quoted in full in the appendix to this brief. The act carried an emergency clause, which, under the provisions of Section 55 of the Constitution of Kentucky, made it operative immediately upon its approval by the Governor. The law requires those subject to its provisions, on or before the 1st day of June, 1920, and on the first day of each month thereafter, to file reports with the Auditor of Public Accounts, showing the amount of tax due on the respective filing dates, and at the same time such reports are filed it is required that payment shall be made to the Auditor of the tax due as of the respective filing dates. Before the first report provided for in the act was due, the appellee, Kentucky Distilleries & Warehouse Company, filed in the district Court of the United States for the Eastern District of Kentucky its bill in equity against Charles L. Dawson, Attorney General of the Commonwealth of Kentucky, Victor A. Bradley, Commonwealth's Attorney of the Fourteenth Judicial District of Kentucky, and John J. Craig, Auditor of Public Accounts of the Commonwealth of Kentucky, attacking the constitutionality of the law. A copy of the bill is found

on pages 1 to 13, both inclusive, of the printed transcript of the record.

It is alleged in the bill that the Kentucky Distilleries & Warehouse Company, the appellee herein, is a corporation organized under the laws of the State of New Jersey; that it owns distilleries, warehouses and bottling plants located in the State of Kentucky, and that for many years prior to the 16th day of January, 1920, it was engaged in Kentucky, as well as elsewhere, in the manufacture and distillation of whiskey, alcohol and high wines for beverage purposes, and in the storing of same in its bonded warehouses in Kentucky and elsewhere and the sale and distribution of same therefrom; and that since the 16th day of January, 1920, it has been engaged in the sale and distribution of such liquors for the purposes now permitted by law. It also appears from the bill that large quantities of the whiskey now stored in the bonded warehouses of appellee in Kentucky have heretofore been sold to customers in various parts of the country, which sales were effected through the medium of warehouse receipts, and that the liquor represented by these warehouse receipts is now held in the bonded warehouses of appellee in Kentucky subject to the order of the owners thereof; that such owners of such warehouse receipts are looking to the appellee as warehouseman and are insisting that it shall perform the duties of a warehouseman with reference to such liquor, and that from day to day the holders of such receipts are demanding

that the appellee ship under bond their whiskey from Kentucky to other States and that appellee is complying with such orders and shipping said whiskey. It also appears from the bill that appellee is bottling whiskey in bond in Kentucky and selling same to the trade. In addition to the whiskey in appellee's bonded warehouses located in Kentucky, represented by warehouse receipts in the hands of purchasers, appellee has stored therein large quantities of liquor belonging to itself, which it is disposing of through the medium of warehouse receipts and in the form of bottled-in-bond case goods. It is alleged in the bill that from March 12, 1920, the effective date of the law attacked in the bill, up to the date the bill was filed, which was May 14, 1920, there had been removed from appellee's bonded warehouses in Kentucky 86,986 proof gallons of whiskey and there had been transferred under bond from such warehouses in Kentucky to warehouses located in other States 7,870 gallons of whiskey. Although the bill is silent on this point, it is, of course, true that the appellee has collected the fifty cent tax on all of the liquor which has been removed from bond or transferred from its Kentucky warehouses under bond since the effective date of the law, and that it now has such tax in its possession.

The appellants, Charles L. Dawson, Attorney General of the Commonwealth of Kentucky, Victor A. Bradley, Commonwealth's Attorney of the Fourteenth Judicial District of Kentucky, and John J.

Craig, Auditor of Public Accounts of the Commonwealth of Kentucky, were made parties defendant to the bill on the ground that they are the authorities charged with the enforcement of the law attacked in the bill and were threatening to and would enforce same, unless enjoined and restrained by the Court from so doing; that failure on the part of appellee to comply with the law, make the reports and pay the tax required by the law would subject it to heavy penalties and would cast a cloud upon the title to its real estate.

The constitutionality of the act in question is assailed in the bill on the following grounds:

1. That so much of the law as imposes a tax of fifty cents upon each proof gallon of whiskey transported in bond out of Kentucky into another State is a tax or burden upon interstate commerce, in violation of Article 1, Section 8, Clause 3, of the Constitution of the United States, and that the invalidity of this portion of the act renders the entire act invalid.

2. That the tax sought to be imposed by the act in question is in violation of Section 171 of the Constitution of the State of Kentucky, which provides that taxes upon all property subject to taxation within the territorial limits of the authority levying the tax shall be uniform. It is claimed in the bill that the tax is not uniform, but imposes double taxation upon whiskey—a burden not imposed upon any other property in the State of Kentucky.

3. That the law is not authorized by, and is in violation of, Section 181 of the Constitution of Kentucky, which authorizes the General Assembly to raise revenue by license fees on franchises, stock used for breeding purposes, the various trades, occupations and professions or a special or excise tax.

4. That the act is in conflict with the National Prohibition Act passed October 28, 1919, pursuant to the Eighteenth Amendment to the Constitution of the United States, and especially to Title II of that act, which prescribes the terms and conditions upon which whiskey may be withdrawn from bonded warehouses or transported in bond from one State to another.

There is no allegation in the bill that unless the appellants are enjoined and restrained from attempting to enforce the law appellee would suffer great or irreparable injury, nor does the bill contain any allegation that appellee has no adequate remedy at law. An injunction is prayed for in the bill, enjoining appellants from in any manner enforcing or attempting to enforce against appellee, its officers, agents or employes, or any of them, the penalties prescribed for a violation of the law attacked in the bill, and from enforcing or attempting to enforce any lien upon any of the whiskey or the property of appellee for the purpose of enforcing collection of the tax.

In accordance with the provisions of Section 266 of the Judicial Code, after notice had been duly given, a motion was made in the District Court of

the United States for the Eastern District of Kentucky, before the Honorable A. C. Denison, Circuit Judge, and the Honorable A. M. J. Cochran and the Honorable J. E. Sater, District Judges, for an interlocutory injunction, restraining the officers of Kentucky from attempting to enforce any of the provisions of the law.

The appellants, Craig, Bradley and Dawson, appeared and filed a motion to dismiss appellee's bill because of lack of equity therein, and because the appellee (plaintiff below) had a full, complete and adequate remedy at law. The appellants filed a second motion to dismiss the bill of appellee, for the reason that same failed to state facts sufficient to support a cause of action against them, or any of them. Appellants also filed a motion to stay proceedings in the Federal Court, claiming that there was then pending in a Court of the State a suit involving the validity of the statute, in which suit a stay of proceedings under the statute had been granted.

With the record in this condition the motion of appellee for an interlocutory injunction was submitted to the three judges above named, who granted an interlocutory injunction. The opinion of the judges granting the interlocutory injunction is found on page 52 of the printed transcript of record. A somewhat similar case to the case at bar had theretofore originated in the District Court of the United States for the Western District of Kentucky, in which case The J. & A. Freiburg Company had se-

cured an interlocutory injunction against Charles L. Dawson, Attorney General of the Commonwealth of Kentucky, and John J. Craig, Auditor of Public Accounts of the Commonwealth of Kentucky. That case is now pending in the Supreme Court of the United States, and is No. 582 on the Court's docket and set for argument on the same day as the case at bar. It will be observed that in the opinion of the lower Court in the case at bar, with certain exceptions, the opinion in the Freiburg case is adopted by the Court as its opinion in the case at bar. The Freiburg opinion will be found on page 53 of the transcript of record. The interlocutory injunction granted by the Court below in the case at bar is found on page 84 of the record. The appellants have prosecuted an appeal direct to this Court, under the provisions of Section 266 of the Judicial Code.

### **ASSIGNMENT OF ERRORS.**

The formal assignment of errors by appellants will be found on page 88 of the printed record, and, briefly stated, the errors complained of are as follows:

1. The court erred in granting the interlocutory injunction herein.
2. The Court erred in holding that the act in question was unconstitutional, and especially in holding that it was void because of excessive penalties imposed for the violation thereof, and in holding that

it imposed a property tax and not a license or excise tax.

3. The court erred in refusing to stay proceedings herein pending the determination of the suit brought in the State court.

4. The Court erred in holding that the plaintiff had no adequate remedy at law, and in holding that imminent irreparable injury was threatened which justified the issuance of an interlocutory injunction.

5. The court erred in refusing to sustain the defendants' motion to dismiss the bill in equity.

In this brief we will discuss the questions involved in a different order from that set out in the assignment of errors, as well as that followed by the court below in its opinion.

### **ALLEGATIONS IN THE BILL NOT SUFFICIENT TO CONFER JURISDICTION ON A COURT OF EQUITY.**

An examination of the bill in this case shows that there is an utter failure on the part of the appellee to plead the necessary facts to give equity jurisdiction. No claim is made in the bill that great or irreparable injury will result to it from the enforcement of the law, nor is there any allegation in the bill that appellee has no adequate remedy at law to protect it in its rights asserted in the bill. This omission, we insist, is fatal to the case of appellee.



Section 267 of the Judicial Code, which is merely declaratory of the pre-existing rule, provides as follows:

“Suits in equity shall not be sustained in any Court of the United States in any case where a plain, adequate and complete remedy may be had at law.”

Where an adequate remedy at law exists, a court of equity has no jurisdiction. Rule 25 of the Rules of Practice for courts of equity of the United States, among other things, provides that a bill of complaint must contain a short and plain statement of the grounds upon which the Court's jurisdiction depends. From the foregoing, it would appear that a failure to plead that there existed no adequate remedy at law amounts to a failure to plead the necessary facts to confer jurisdiction on the Court. Plaintiff below, however, probably realized that it could not truthfully plead that there existed no plain, adequate and complete remedy at law. We insist that it had such a remedy.

#### **PLAINTIFF BELOW HAS AN ADEQUATE REMEDY AT LAW.**

The universal rule in the Federal Court is that a court of equity will not allow its injunction to issue to restrain officers from the collection of taxes, except where it may be necessary to protect the rights of citizens whose property is taxed and where there is no adequate remedy by the ordinary processes of the

law. The mere unconstitutionality or illegality of the law under which the tax is asserted is not sufficient to authorize the Federal Courts to use their injunctive processes to prevent the enforcement of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, produce irreparable injury, or, where the property of the complainant is real estate, throw a cloud upon the title to the property of complainant and that there is no adequate remedy at law, before the aid of a court of equity may be invoked.

Judicial Code, Sec. 267.

*Dow v. City of Chicago, etc.*, 11 Wall. 108, 20 L. Ed. 65.

*Indiana Mfg. Co. v. Koehne*, 188 U. S. 681, 47 L. Ed. 651.

*Shelton v. Platt*, 139 U. S. 591, 35 L. Ed. 273.

*Allen v. Pullman Palace Car Co.*, 139 U. S. 658, 35 L. Ed. 303.

*Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U. S. 276, 53 L. Ed. 796.

*Singer Sewing Machine Co. v. Benedict*, 229 U. S. 481, 57 L. Ed. 1288.

*Arkansas Building & Loan Ass'n v. Madden*, 175 U. S. 269, 44 L. Ed. 159.

With this statement of the law, which seems to be clearly established, it is important to determine if in the case at bar the appellee has an adequate remedy at law. Sections 162 and 163 of Kentucky Statutes are as follows:

**"SEC. 162. TAXES WRONGFULLY COLLECTED REFUNDED.** When it shall

appear to the Auditor that money has been paid into the treasury for taxes when no such taxes were in fact due, he shall issue his warrant on the treasury for such money so improperly paid, in behalf of the person who paid the same. Nothing herein contained shall authorize the issuing of any such warrant in favor of any person who may have made payment of the revenue tax due on any tract of land, unless it is manifest that the whole of the tax due the Commonwealth on such land has been paid, independent of the mistaken payment, and ought to be reimbursed.

**SEC. 163. TIME IN WHICH TAXES MAY BE REFUNDED.** He shall not draw his warrant for any money improperly paid for taxes, unless application be made in each case within two years from the time when such payment was made."

The Court of Appeals of Kentucky, in construing these two sections of the statute, has held that where the tax was paid directly to the Auditor, or directly into the State Treasury, and where no part of same was due, as when same is paid where there is no warrant in the statutory law of the State for the levy or collection of such taxes, or as when same is paid under a void or unenforceable statute, or through mistake or inadvertence of the taxpayer, it is the duty of the Auditor to refund the taxes so paid. *Greene, Auditor, v. Taylor*, 184 Ky. 739. The last case construing these two sections of Kentucky Statutes is the case of *John J. Craig, Auditor, v. Security Producing & Refining Company*, 189 Ky. 565, decided by the Court of Appeals of Kentucky on November 16, 1920, and inasmuch as it is claimed in the opinion

of the lower Court that there is some confusion in the opinions of the Court of Appeals of Kentucky construing these two sections of the statute, we think it advisable to quote the opinion referred to, *supra*, in full. It is as follows:

“The Security Producing and Refining Company, a corporation, was assessed by the State Tax Commission and paid into the State treasury a license tax \$750.00, for the year 1918, and a like amount for the year 1919, under Sections 4189a and 4189c, Kentucky Statutes, and is now suing and is granted a mandamus by the lower court against the Auditor, requiring him to draw his warrant on the State treasury for the \$1,500.-00 paid by it as tax when no license tax was due by said company at that time on this account. The Auditor is prosecuting this appeal. Section 162, Kentucky Statutes, provides ‘when it shall appear to the Auditor that money has been paid into the treasury for taxes when no such taxes were in fact due, he shall issue his warrant on the treasury for such money so improperly paid, in behalf of the person who paid the same. Nothing herein contained shall authorize the issuing of any such warrant in favor of any person who may have made payment of the revenue tax due on any tract of land, unless it is manifest that the whole of the tax due the Commonwealth on such land has been paid, independent of the mistaken payment, and ought to be reimbursed.’ In construing this section of the statutes we held in *Greene Auditor v. Taylor*, 184 Ky. 739, ‘that taxes voluntarily paid to counties, cities, towns and county officers, collecting the State’s revenues and other collecting officers, can not be recovered although not due, and paid under a mistake of law. *City of Louisville v. Anderson*, 79

Ky. 334; *L. & N. R. R. Co. v. Hopkins Co.*, 87 Ky. 605; *L. & N. R. R. Co. v. Commonwealth*, 89 Ky. 531.

"It is conceded that the Security Producing & Refining Company paid, through mistake of law, the taxes for 1918 and 1919 under Sections 4189a and 4189c, when it was required to and did pay to the State a license tax equal to one per centum of the market value of the crude petroleum produced by it. It thus paid two license taxes when it was liable for only one. When it became liable for the license tax under Section 4223c on its oil production, it was by the provisions of Section 4189a relieved of liability for a license tax upon its capital stock, but it paid both these taxes and now seeks to recover the sum paid as the latter.

"Appellee corporation insists that the attempted assessment of the taxes by the Tax Commission against the corporation was wholly without authority and, therefore, void.

"Fundamentally no tax can be levied or collected by the State, except under and by authority of legislative enactment. Money otherwise received by the State as taxes is unwarranted, and should be returned to the payor upon his compliance with the provisions of Section 163, Kentucky Statutes. It is admitted that the money sought to be recovered in this action, though paid as taxes, was not due as such, and the Security Company by mistake of law paid the same, though unwilling to do so, had it comprehended its legal rights. The attempted assessment made by the State Tax Commission was unwarranted and void because no such license tax was due at that time from the corporation. Money so paid as taxes should be returned to the payor on his timely application. The statutes, Section 162, which provides that when

it shall appear to the Auditor that money has been paid into the treasury as taxes when none were in fact due, *shall* be returned to the payor was intended to cover all such cases. Such improper payment of money into the treasury as taxes can not but appear to the Auditor by a glance at the statutes. He does not have to go into or review the attempted assessment made by the State Tax Commission, but need only to acquaint himself with the facts and look at the statutes imposing the tax on corporations to have it certainly appear to him that money has been paid into the treasury as taxes by the corporation when no such taxes were in fact due. When it does so appear to the auditor it is his duty to and he may be compelled by mandamus to issue his warrant on the treasury in repayment of the same. In every case where money is received as taxes when not authorized by statute or in violation thereof, the duty immediately devolves on the Auditor, upon proper application by the person paying the same, to issue his warrant on the treasury in repayment of said sum to the payor. It can appear to the Auditor that money has been paid into the treasury as taxes when none are due in at least two ways: (1) When there is no warrant in the statutory law of the State for the levy or collection of such taxes; (2) when the improper and unwarranted payment is made under a void or unenforceable statute or through mistake or inadvertence of the taxpayer, directly into the treasury or to the Auditor. In either of such case it can not fail to appear to the Auditor upon proper investigation that money has been paid into the treasury as taxes when no such taxes were in fact due, and it then becomes his duty to and he *shall* issue his warrant on the treasury for the repayment of the money so improperly paid in behalf

of the person who paid the same, provided proper application is made therefor. Manifestly the purpose of the Legislature in passing Section 162, *supra*, was to secure the return of all money paid into the treasury as taxes by taxpayers through mistake, inadvertence, misapprehension of the law, or under void or unenforceable statutes, for it expressly declares it to be the duty of the Auditor to issue his warrant in every case where it shall appear to him that the State holds money rightfully and in good conscience belonging to another.

"Following this rule, the Auditor should have promptly issued his warrant on the treasury for \$1,500 in favor of appellee, Security Producing and Refining Company.

"The Auditor can not act arbitrarily in the payment of money, but will be held to strict accountability for all money paid out by him. In doubtful cases he should refuse payment until the question has been determined by the courts. But in every case, such as this, where it is made to appear to the Auditor that money has been paid into the treasury as taxes when no such taxes were in fact due, and demand has been made for its return within the time and in the manner provided by Section 162, Kentucky Statutes, he should promptly draw his warrant on the treasury and return to the payor the money thus received, but the Auditor is not required to go into or review assessments of taxing agencies to determine whether the payment is due or not.

"The cases of *Bank of Commerce of Louisville v. Stone*, 108 Ky. 427, and *Greene, Auditor, v. Taylor*, *supra*; *Louisville City National Bank v. Caulter*, 112 Ky. 584; *Cannely v. Bosworth*, 160 Ky. 312; *Louisville Gas Co. v. Bosworth*, 160 Ky. 824, and all other cases announcing a simi-

bar rule, in so far as they conflict with the construction herein given Section 162, Kentucky Statutes, are expressly overruled. We can think of no reason why the State should not be required to live up to the same moral standards demanded of individuals and repay money received by it through mistake or inadvertence. Any other rule is unconscionable and is bad in morals if not actually dishonest. The State should not merely because it has the power to declare the law, take to itself money rightfully and in good conscience belonging to its citizens and taxpayers without just return. Such a statute would be both arbitrary and unjust and we can not conceive of the great law-making department of this Commonwealth contemplating such a thing by the enactment of Section 162, Kentucky Statutes. Such a purpose, if expressed in a statute would be inimical to all the past declared public policy of the State. The lower court did not err in awarding the writ or mandamus against the Auditor compelling him to draw his warrant on the treasury in favor of the plaintiff and appellee and the judgment is affirmed."

This case was decided by the Kentucky Court of Appeals after the lower Court granted the injunction in the case at bar, and it clears up any uncertainty in the meaning of Section 162, Kentucky Statutes, that may have theretofore existed, and it has been followed in the case of *Craig, Auditor, v. Frankfort Distilling Co.*, decided by the Court of Appeals November 23, 1920.

Now, the appellee's contention in the case at bar is that the statute under which the tax is asserted



is unconstitutional and void. The Act attacked requires no action by any assessing board. By its terms the taxes are paid directly to the Auditor. The amount is figured by the taxpayer himself. Therefore, by no stretch of the imagination can it be said that the Auditor, in refunding taxes collected under the law attacked in the bill, would be required to review the action of any other assessing body. If the taxpayer pays these taxes under protest, then certainly under the authority of the case just quoted he has the right to demand of the Auditor a warrant for the refund of these taxes, and, upon the failure of the Auditor to refund same, the taxpayer may sue the Auditor in an action at law and obtain a mandamus compelling the Auditor to perform his duty and issue his warrant for the amount of taxes wrongfully collected. In such a suit the plaintiff could set up every objection to the validity of the statute which it has set up in the suit at bar, including the Federal questions. That being true, it would seem that the appellee in the case at bar has a full, complete and adequate remedy at law. Certainly its remedy under the Statutes of Kentucky, as interpreted in the case of *Craig, Auditor, v. Security Producing & Refining Company, supra*, is as adequate and complete as were the remedies held by this Court to be adequate in many of the adjudicated cases.

In order to compare the remedy afforded to appellee by the Statutes of Kentucky, under Sections 162 and 163, with the remedies which have in various

cases been held to be adequate by this Court, we deem it proper to examine the facts in a few of the cases heretofore passed upon by this Court.

One of the earliest and one of the leading cases on this question is the case of *Dow v. City of Chicago*, etc., 11 Wall. 108, 20 L. Ed. 65. In that case the aid of equity was invoked to prevent the collection of a tax levied by the city of Chicago on shares of the capital stock of the Union National Bank of Chicago owned by the complainant. The principal grounds alleged for relief were that the tax lacked uniformity; that the bank shares attempted to be taxed were owned by non-residents of the State and, therefore, had no taxable situs in Chicago, and that the assessment was made without any notice to the complainant. It was claimed, of course, that the taxing authorities were threatening to sell the shares of stock and work irreparable injury upon the complainant. Objection was made by the defendant to the bill on the ground that there was an adequate remedy at law. The Court, in discussing the adequacy of the remedy at law which the complainant had, used this language:

“If the tax was illegal, the plaintiff protesting against its enforcement might have had his action, after it was paid, against the officer or the city to recover back the money; or he might have prosecuted either for his damage. No irreparable injury would have followed to him from its collection: Nor would he have been compelled to resort to a multiplicity of suits to de-

termine his rights. His entire claim might have been embraced in a single action."

The case of *Indiana Manufacturing Company v. Koehne*, 188 U. S. 681, 47 L. Ed. 651, was a suit seeking to enjoin the collection of certain taxes which had been assessed against the complainant, a corporation of Indiana. It was charged that such taxes, or a greater part of them, were illegal; that the law was in violation of the Federal Constitution, and that the taxing authorities were threatening to levy upon the property of the complainant for the purpose of collecting the tax; that its wrongful collection would lead to a multiplicity of suits, and that irreparable injury would be sustained by the complainant if the law were enforced against it. It also appears from the opinion in this case that the county authorities collected, not only the county revenue, but acted also as the collecting agency for the State's part of the tax. Under the laws of Indiana it seems that Indiana corporations are required to make a report to the assessor, showing the property of the corporation subject to the tax, and the assessor delivers such report to the county auditor, who, in turn, delivers it to a board of review, and this board values and assesses the capital stock and franchises and other property of the company for the purposes of taxation, under the law. From the action of this board the corporation assessed has the right of appeal to the State Tax Commission. Upon this appeal the State Tax Commission has the right to decide as to

the assessment, and to make such an assessment, increasing or reducing it as it may decide proper, and the Auditor then certifies the action of this board to the several counties, after which the collection is made by the proper county official.

Another law of the State of Indiana provides that in case any person or corporation conceives that he should not have paid a tax, or has been erroneously assessed, he may appear before the Board of Commissioners of the county and establish by proper proof that he has paid taxes which were wrongfully assessed against him, and it is thereby made the duty of the board to order the amount so proven to have been wrongfully collected to be refunded to the payer from the county treasury, so far as the same was paid for county taxes, and, as to that portion of same which was paid to the State, it is made the duty of the county board to certify to the Auditor the amount so proven to have been wrongfully collected, and the Auditor is then required to direct the treasurer of the State to refund same. Upon the failure of the authorities to comply with this provision of the law, the taxpayer is then given his remedy by suit.

In this case the defendant moved to dismiss the bill for want of equity, on the ground that the statute furnished to the complainant an adequate remedy at law. The Supreme Court of the United States upheld this contention and held that under this state of facts the complainant had an adequate remedy at law, and sustained the lower Court in refusing to

grant the injunction. In this case the Court held that it wasn't even necessary, in order to recover the tax back which had been paid to the State, to sue the State Auditor at all; that, inasmuch as the county was made the collecting agency for the State, the suit could be brought directly against the county, and the county could not be heard to defend upon the ground that the money had already been paid over to the State, provided notice had theretofore been given to the county that the complainant regarded the tax as illegally collected.

In the case of *Shelton v. Platt*, 139 U. S. 591, 35 L. Ed. 273, there was involved an Act of the Legislature of Tennessee, imposing license taxes on an express company. The claim was made that it was unconstitutional; that it interfered with interstate commerce, and was therefore violative of the Federal Constitution; that its enforcement would subject it to having its property seized by the sheriff and would greatly embarrass the company in the conduct of its interstate business, and the public served by it would be subjected to great inconvenience, and the complainant would suffer irreparable injury by the enforcement of the law. To this bill the defendants demurred on the ground that the complainant had an adequate remedy at law, and the opinion discloses that the law of Tennessee provided that in cases where the taxpayer claimed he did not owe the taxes, he might pay under protest and then sue to recover back. The complainant claimed that this was

not an adequate remedy at law. The Supreme Court, however, held that under the law of Tennessee permitting a recovery back, the complainant had a full and adequate remedy at law, and denied the injunction.

In the case of *Allen v. Pullman Palace Car Company*, 139 U. S. 658, 35 L. Ed. 303, the complainants were attacking as unconstitutional a license tax which they claimed placed a burden on interstate commerce, and because they claimed it denied the taxpayer the equal protection of the law; and because it was void for repugnancy to the Constitution of the State and the Constitution of the United States. It was also alleged in the bill that in an effort to enforce collection of the taxes against the complainant, the Pullman Palace Car Company, the sheriff of the county had seized and attached a certain sleeping-car belonging to the company, and had advertised and threatened to sell same, and was threatening to seize and sell other cars. The allegation was made that this car would not sell at a forced sale for what it was worth, and, in addition thereto, the seizure of this car and the threatened seizure of other cars would hamper the company in its interstate commerce, and, in addition thereto, would destroy its power to be of adequate service to its patrons, and it would thereby be rendered liable for a multiplicity of suits by its patrons.

It would seem that a case of irreparable injury was as strongly made out as could possibly be made

under the circumstances. No question was made in the lower court at all of the power of the court to grant the injunction and the lower court granted such an injunction. The question of the power of the court to grant the injunction was raised for the first time in the Supreme Court, and, notwithstanding the fact that it was raised for the first time in the Supreme Court, this court held that the pleadings themselves showed that the complainant was not entitled to the relief sought, and reversed the case on the ground that equity should not have granted the injunction under the circumstances, as it appeared that under the law of Tennessee the company had an adequate remedy at law to recover the value of the cars taken, and had it wished to avoid the sale an easy and adequate method was furnished by which it could have avoided the sale and still have sustained no loss. All it had to do was to pay the tax under protest, and then sue to recover same back.

In the case of Boise Artesian Hot & Cold Water Company v. Boise City, 213 U. S. 276, 53 L. Ed. 796, the court had under consideration the legality of an ordinance of Boise City, Idaho, which imposed a license of three hundred dollars per month on a certain water company which occupied the streets and alleys of the city with its pipes, under a franchise theretofore acquired by it. The bill of complaint attacked the ordinance on the ground that it was discriminatory, and that like licenses had not been exacted of other corporations; that the city was threat-

ening, unless the license was paid, to remove the pipes and other waterworks from the city; that it had brought suits in the State courts to recover the amounts alleged to be already due on account of the license, and would bring other suits, thereby resulting in a multiplicity of suits, and that the ordinance had cast a cloud upon the company's franchise, and thereby depreciated the value of its property, impaired its credits and confiscated its property; that the ordinance impaired the obligation of its contract theretofore made with the city, and that the enforcement of the ordinance would take the company's property without due process of law and abridge its privileges granted by the Fourteenth Amendment, and that the ordinance violated the Constitution and laws of the State. An objection was interposed to the suit on the ground that the plaintiff had an adequate remedy at law, and the Court, by Mr. Justice Moody, sustaining this contention, used this language:

"It has been held uniformly that the illegality or unconstitutionality of a State or municipal tax or imposition is not of itself a ground for equitable relief in the courts of the United States. In such a case the aggrieved party is left to his remedy at law, when that remedy is as complete, practicable and efficient as the remedy in equity. And the rule applies as well where the right asserted is by way of defense. *Phoenix Mut. L. Ins. Co. v. Bailey*, 13 Wall. 616, 623, 20 L. Ed. 501, 503.



"In order to give equity jurisdiction, there must be shown, in addition to the illegality or unconstitutionality of the tax or imposition, other circumstances bringing the case under some recognized head of equity jurisdiction, before the remedy by injunction can be awarded. The leading case on the subject is *Dow v. Chicago*, 11 Wall. 108, 20 L. Ed. 65. In that case the plaintiff sought to enjoin the collection of a tax levied upon shares of the capital stock of a national bank on the ground that the levy was unconstitutional under the State law, and that the property was not within the jurisdiction of the State. This court declined to pass upon the validity of the tax, saying, through Mr. Justice Field (p. 109) :

" 'The illegality of the tax and the threatened sale of the shares for its payment constitute of themselves alone no ground for such interposition. There must be some special circumstances attending a threatened injury of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction, before the preventive remedy of injunction can be invoked. It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible.' \* \* \* "

In the case of *Singer Sewing Machine Company v. Benedict*, 229 U. S. 481, 57 L. Ed. 1288, the court quoted with approval the rule announced in the last case, *supra*. The *Singer Sewing Machine Company* case, *supra*, was a case where a New Jersey corporation was seeking to enjoin the collection of taxes

levied by the city and county of Denver, in the State of Colorado, which taxes the company was claiming were not due, on the ground that it had no notice of the assessment. The bill also contained allegations that the company had no property within the city and county other than that already returned and paid upon by it, and that the additional assessment and tax levied thereon were illegal, and that to enforce the collection of such taxes would be violative of designated provisions of the Constitution of the United States. A demurrer was filed to the bill, on the ground that the plaintiff had an adequate remedy at law. It appears from the opinion that Colorado had a law providing that whenever illegal taxes were collected, the county commissioners should make a refund of same to the taxpayer, and the taxpayer is given a right, upon the failure of the county commissioner to make the refund, to enforce his rights in an action at law. The court upheld the contention of defendant and denied the injunction, holding that the statute which gave the right to the taxpayer to sue to recover the taxes erroneously paid was a full and adequate remedy at law.

In the case of *Arkansas Building & Loan Association v. Madden*, 175 U. S. 269, 44 L. Ed. 159, the building and loan association was contesting in a court of equity the collection of a license tax by the State of Texas. It was claimed that great and irreparable injury would be suffered by the complainant if the tax were permitted to be collected, and that

it would be subjected to a multiplicity of suits unless the enforcement of the law was enjoined. The court, however, Chief Justice Fuller writing the opinion, held that inasmuch as there was no law of Texas prohibiting it, the tax could be paid by the complainant under protest to the State officer whose duty it was to collect the tax, and that then suit at law might be brought to collect this tax back from the officer collecting same, and, inasmuch as this remedy existed, it was full, complete and adequate, and that equity should not issue an injunction to restrain the enforcement of the statute.

It is suggested in the opinion of the court below that the case of *Ex parte Young*, 209 U. S. 123, 52 L. Ed. 714, is authority for granting the injunction in the case at bar. We do not so understand the *Young* case. In that case was involved the validity of what is known as the "Minnesota Rate Laws." That State had passed certain laws prescribing certain rates as maximum rates for passengers and certain rates as maximum rates for commodities. Heavy penalties, including penitentiary sentences, were denounced against those violating the law and charging higher rates than the maximum rates fixed by the statute. An injunction was granted, preventing the Attorney General from prosecuting complainants for a violation of the law, it being claimed that unless such injunction was granted a multiplicity of suits would result, great and irreparable injury would be suffered by the company, and to at-

tempt to test the validity of the law in the courts would subject those testing same to heavy penalties and probable confinement in the penitentiary, if the law should be ultimately held to be good. The Attorney General disregarded this injunction, and was fined and placed in the custody of the marshal, and the case came up on a *habeas corpus* proceeding. In that case the complainants were confronted with this situation: They must either refuse to comply with the law and thereby take a chance of going to the penitentiary and being fined if the law should be held good or they might comply with the law. In event they complied with the law, they would be absolutely without remedy to recover back the losses they sustained by operating under what was claimed to be destructively low rates, in event it should be ultimately determined in a suit that the law fixing the rates was illegal. So it clearly appeared in that case, not only that there was no adequate remedy at law available to complainants, but that they would suffer irreparable injury, no part of which could be recovered unless a temporary injunction was granted. Such is not the case here. No irreparable injury or damage will be sustained by the appellee in this case by complying with the law and then seeking his remedy under Section 162 of Kentucky Statutes. Appellee is not confronted with the danger of having great penalties inflicted upon it, nor is it confronted with the danger or chance of irreparable loss should it comply with the law and pay the tax.

Appellee can avoid all danger of penalties and at the same time protect itself in whatever rights it may have. All appellee has to do is to pay the tax and then make a request to the Auditor to refund it. If the Auditor refuses to refund, under the authorities above referred to a suit may be brought against him to compel a refund. There would be no necessity for more than one suit, irrespective of how many different withdrawals or removals the appellee may desire to make. The matter can be tested in one suit, and while that suit is pending, should it desire to remove other whiskey upon which the tax is due, it could pay the tax and make a demand for the refund, and the matter could be held in abeyance after such demand until the suit involving the right to recover the tax has been decided. Should the one suit be decided in favor of the taxpayer, then under the authority of the case of *Craig, Auditor, v. Security Producing & Refining Company, supra*, it would be the Auditor's duty to promptly refund all payments of taxes made subsequent to the bringing of the suit, and the assumption is that the Auditor would do his plain duty and make such refund. Appellee does not have to sue any other taxing authority than the Auditor, because all the tax collected under the law in question is for State purposes. No question of having to sue the county or the city or the school district is involved, because they secure no part of the tax. The cases hereinbefore cited, and especially the case of *Dow v. City of Chicago, supra*, and *Allen v. Pullman*

Palace Car Company, *supra*, are conclusive against the complainant's plea of irreparable injury, as these cases hold that where the statute provides a method of recovering the tax back from the collecting authority, no claim of irreparable injury will be sustained. Nor can the appellee be heard to complain on the ground that the tax imposed by the law casts a cloud on its real estate. Section 162 of the Kentucky Statutes, above referred to, furnishes to appellee ample means of releasing its property from lien. All it has to do is to pay the tax and then any cloud upon the title to its real estate is removed.

In the case of *Union Pacific Railroad Company v. Weld County*, 247 U. S. 282, the court used this language:

"And it also is immaterial that the taxes were made a lien on the company's real property, for the lien would be effectually removed by paying them and suing to recover back."

See also *Allen v. Pullman Palace Car Company*, 139 U. S. 658, and *Arkansas Building & Loan Association v. Madden*, 175 U. S. 269, 44 L. Ed. 159.

In the light of these cases we submit that the complainant has a full, complete and adequate remedy at law and that it should be remitted to this remedy. That it may be more convenient to test the validity of the law in question by an equity proceeding is no justification for such proceeding where an adequate remedy at law exists. As Chief Justice Fuller ex-

pressed it in the case of Arkansas Building & Loan Association v. Madden, 175 U. S. 269, 44 L. Ed. 159:

“It is quite possible that in cases of this sort the validity of a law may be more conveniently tested by the party denying it by a bill in equity than by an action at law, but considerations of that character, while they may explain, do not justify the resort to that mode of proceeding.”

### **THE PROCEEDING SHOULD HAVE BEEN ABATED.**

Another reason why the temporary injunction should not have been granted is that there was at the time the injunction was granted, and there is now pending in the Franklin County Circuit Court of Kentucky, a court which has jurisdiction to enforce the statute, a suit to test the validity of the law attacked in the bill in this case. In this State suit there was a stay of proceedings, staying the Auditor and Attorney General from proceeding under the law. The record of this proceeding in the State Court is found on pages 24 to 49 of the Transcript of the Record. That the Franklin Circuit Court has jurisdiction to enforce the law in question, we assume counsel for appellee will not deny. We think the same rule which prohibits the Federal Court from using its injunctive process to stay the collection of a State tax, where there is an adequate remedy at law, holds good also in the State courts; but whether it does or does not, the temporary restraining order issued by the Clerk of the Franklin Circuit Court, staying the

hands of the appellants herein is binding upon them until the restraining order is set aside. Under the law of Kentucky, it remains in full force and effect until same has been dissolved by a circuit judge upon a hearing.

Section 266 of the Judicial Code, among other things, provides as follows:

“It is further provided that if before the final hearing of such application, a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State.”

We do not see how it can be contended that this law means other than that whenever a suit to test the validity of a law has been brought in a State court having jurisdiction to enforce the law, and a stay of proceedings has been had in that suit, then the Federal court must stay its hand until a final determination of the case in the State court. The words, “to enforce such statute or order,” by every rule of grammatical construction must be held to modify the word “jurisdiction.”

Counsel for appellee contend that the suit must have been brought by the State to enforce the law. Such a contention leads to an absurdity, for the rea-



son that if the State brings a suit to enforce the law, by no possible means could a stay be had by the plaintiff in that suit. Certainly the State could not take a stay and at the same time seek to enforce the law. There would be no necessity for the defendant to have a stay, because in his answer he could defend upon all the propositions relied upon to make the law invalid, and, of course, it could not be enforced against him until those questions were finally determined. So it seems that portion of Section 266 above quoted must mean that whenever any one attacks the validity of a law in a State court, and in that attack, by injunction or restraining order, stays the hands of those charged with the enforcement of the law, that fact of itself automatically, when made known to the Federal court, stays the hand of the Federal court.

**THE TAX IMPOSED BY THE ACT IN QUESTION IS  
AN OCCUPATIONAL OR EXCISE TAX, AND  
JUSTIFIED UNDER SECTION 181 OF  
THE CONSTITUTION OF  
KENTUCKY.**

Section 181 of the Constitution of Kentucky is as follows:

“The General Assembly shall not impose taxes for the purposes of any county, city, town or other municipal corporation, but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes. The General Assembly may, by general laws only, provide for the payment

of license fees on franchises, stock used for breeding purposes, the various trades, occupations and professions, or a special or excise tax; and may, by general laws, delegate the power to counties, towns, cities and other municipal corporations, to impose and collect license fees on stock used for breeding purposes, on franchises, trades, occupations and professions "

This provision of the Constitution confers on the Legislature the right to put a license tax on any business for the purpose of raising revenue, or to impose a special or excise tax for that purpose. Counsel for appellee in this case are contending that the tax in question is not an occupational or excise tax, but is a tax on property; or, if not a tax upon property, that it is an arbitrary attempt on the part of the Legislature to single out and define as a business something that was not contemplated under Section 181 of the Constitution should be treated as a business. The tax is not an *ad valorem* tax, and the Court of Appeals of Kentucky has repeatedly held that such a tax is not a property tax. The law in question in this case is almost an exact duplicate of an act passed by the special session of the General Assembly in 1917, which imposes a license tax of two cents per gallon upon manufacturers of distilled spirits and the owners of warehouses in which such distilled spirits were stored, same to be paid upon removal from bond or upon transfer under bond from one warehouse to another. The language of the Act of 1917, in so far as applicable, is as follows:

“Every corporation, association, company, co-partnership or individual engaged in the business or occupation of manufacturing distilled spirits known as whiskey or brandy or other species of double stamped spirits in this State, and every owner or proprietor of a bonded warehouse in this State in which such spirits are stored, shall, in addition to the taxes now imposed by law, pay to the Commonwealth of Kentucky a license tax of two cents on every proof gallon of such distilled spirits which is liable for tax to the Federal government, as shown by its official records.”

This act was repealed by the law attacked in this bill. However, the Court of Appeals of Kentucky, in the case of *Greene, Auditor v. Taylor & Sons*, 184 Ky. 739, held that this was a license or occupational tax. The Legislature in 1917 also imposed upon oil producers a tax equal to one per cent of the market value of all crude petroleum produced in Kentucky, which law made the pipe line companies handling such oil the collecting agencies for the State and responsible for the tax. The Court of Appeals of Kentucky, in the case of *Raydure v. Board of Supervisors of Estill County*, 183 Ky. 84, held that this tax was an occupational tax. For many years we have had in Kentucky a law imposing a tax on persons engaged in rectifying whiskey, the tax being one and one-fourth cents upon every wine gallon of whiskey compounded and rectified by the persons embraced within the provisions of the act. The Supreme Court of the United States in the case of *Brown-Forman*

Company v. Kentucky, 217 U. S. 563, 54 L. Ed. 883, held that this was an occupational tax. See also: American Manufacturing Co. v. City of St. Louis, 250 U. S. 459. So that it would seem that there can be no question that the tax complained of in the petition in this case is an occupational or an excise tax.

Nor do we think that the inapt use of the word "annual" appearing in the title and in Section 1 of the act makes the tax in effect an *ad valorem* tax. The use of this word "annual" may lead to the suggestion that the law imposes a tax of fifty cents per proof gallon for each proof gallon of spirits stored in a bonded warehouse for each year same may remain in such warehouse. However, there is nowhere in the act the slightest intimation that the Legislature intended that this tax should be a cumulative one, piling up at the rate of fifty cents per year for each year that a gallon of whiskey remains in a bonded warehouse. If the word "annual" has any meaning in the act at all, it is merely intended to express the purpose of the Legislature that for the privilege of doing business each year, there should be imposed on the persons embraced in the terms of the act an annual license tax, which would be the amount produced by multiplying the number of gallons removed from bond in that year by fifty cents per gallon. In that sense it is an annual tax, but every provision of the act belies any intent on the part of the Legislature that the tax should be cumulative and figured by the number of years the whiskey which

stands in lien for the tax remains in a bonded warehouse. Had the Legislature intended that this tax should be a cumulative one, to be determined by the number of years the whiskey remained in a bonded warehouse, it would certainly have provided some machinery in the act by which the Auditor and those charged with the enforcement of the act would be enabled to know how many years each particular gallon of whiskey removed from bond had been in bond and subject to the tax imposed. No such provisions are made anywhere in the act. The reports made each month are not required to show the length of time the whiskey removed from bonded warehouses had remained in bond and subject to the tax. Surely, had the Legislature intended that this tax should pile up at the rate of fifty cents per gallon per year, some requirement providing for this important and necessary information would have been embraced in the act. Section 3 of the act clearly shows the real basis upon which the tax is to be collected. It simply imposes a license tax, to be measured by the number of proof gallons removed by any person affected by the same from a bonded warehouse or transferred under bond to a bonded warehouse out of Kentucky. The number of gallons is the criterion by which to calculate the amount of tax due by any particular individual affected by the law. The authorities charged with the enforcement of the law do not regard it as a cumulative tax, and no person is required under the terms of the law to pay a tax of fifty cents

per proof gallon for each year a gallon of whiskey may remain in a bonded warehouse. One payment of fifty cents per proof gallon, due and payable upon its removal from a bonded warehouse, or upon its transfer under bond out of the State, fully satisfies the provisions of the law.

It may be suggested by counsel for appellee that the Legislature has singled out as an occupation in the law in question the single business of owning and storing intoxicating spirits in bonded warehouses and removing same therefrom, and that such is not an occupation within the meaning of Section 181 of the Constitution. We think, however, that this construction does violence to the real meaning of the law. While the law may be inaptly drawn and expressed, a reading of all of its provisions clearly indicates that it was the purpose of the Legislature to tax one continuous business, beginning with the distiller and ending with the removal of the distilled spirits from the bonded warehouse in which the distiller stored such spirits. We do not see how it can be successfully contended that the distiller under this act must pay a tax of fifty cents per gallon for manufacturing, and in addition to this tax the person who stores same in a bonded warehouse must pay another tax, and the person who removes same from the bonded warehouse must pay a third tax. The evident purpose of the Legislature was that this entire business of distilling, owning and storing and removing from bonded warehouses

should bear only the one tax as an occupational tax. The fact that a portion of the acts constituting the business had already been performed at the date of the passage of the law should in no wise affect the validity of the act. It is true as to most of the liquor reached by this tax that the act of distilling same had been performed and completed prior to the passage of the act, but it was an act subject to an occupational tax at the time the distilling was done, and the mere fact that the law may appear in a sense retroactive as to that portion of the business in no wise invalidates same, the inhibition against *ex post facto* laws applying only to criminal statutes. There is no provision in the Constitution of Kentucky nor of the United States which forbids the enactment of retrospective legislation, so long as such legislation is not an *ex post facto* statute within the meaning of the Constitution, and so long as same does not impair the obligation of a contract or interfere with vested rights.

Locke v. City of New Orleans, 4 Wall. 172, 18 L. Ed. 334.

League v. Texas, 184 U. S. 156, 46 L. Ed. 478.

Kentucky Union Co. v. Kentucky, 219 U. S. 140, 55 L. Ed. 137.

Cooley on Taxation, 3rd Edition, Vol. 1, 492.

Billings v. United States, 232 U. S. 261, 58 L. Ed. 596.

It will be observed that Section 2 of the act makes the warehouseman in whose place the liquors are stored the collecting agency of the State, and he is

required to make the reports, showing the amount of tax due on each reporting day. No tax is required of the distiller at the time he distills his liquor and places it in a bonded warehouse. No separate tax is required of the owner and storer of liquor as long as it remains in the bonded warehouse. It is only when the liquor is removed from bond or transferred under bond out of the State that the tax becomes due, and an examination of Section 3 of the act discloses that only one tax for the entire business is to be collected, and this is measured at the rate of fifty cents for each proof gallon of liquor which is removed from bond or transferred under bond out of the State. The evident purpose of the act was to impose a tax on the one business of manufacturing distilled spirits and the preparation of same for market, and the intent of the Legislature was to make each and all of the agencies engaged in the manufacture and preparation and the handling of this liquor responsible for this one tax, the apportionment of the tax between these various agencies being left to the agencies themselves.

As a further inducement to the belief that the Legislature was attempting to impose an occupational tax on the one business—manufacturing distilled spirits and the preparation of same for market—we invite the court's attention to Section 8 of the act in question, which refers to persons "engaged in the business covered and licensed by this act." It would seem from this language in Section 8 that the Legislature regarded the business attempted



to be taxed as one business, and not as a series of occupations. Furthermore, the construction placed on the Act of 1917, which the Act in question displaces, is persuasive of our contention that the purpose was to tax only the one business. While the Act of 1917 provided in express terms that every corporation, association, company, etc., engaged in the business or occupation of manufacturing distilled spirits, and every owner or proprietor of a bonded warehouse in this State in which such spirits are stored, should pay a license tax of two cents on every proof gallon of such distilled spirits, the uniform construction placed upon this act by the authorities charged with its enforcement was that it imposed only one tax on the one business of distilling and storing liquors in a bonded warehouse. During all the period this law was in effect, no claim was made by the authorities charged with its enforcement that the Act of 1917 imposed a tax on the business of distilling and a separate tax on the warehouseman.

Even should the Court be of opinion, however, that our construction of this act is erroneous, and that it is not a tax on the one occupation of distilling, owning and storing in bonded warehouses, but that the Legislature was undertaking to tax the business of owning and storing in bonded warehouses as a separate business, we think the law is justified under Section 181 of the State Constitution. Persons who store liquor in bonded warehouses do so for a certain definite purpose. One is to permit it to age, so that

it may be bottled in bond and then sold to the trade. To do this, under government regulations, it must remain in storage and age for four years. This is undoubtedly doing something which is a necessary part of the business of manufacturing and selling liquor. Another purpose in storing liquor in a bonded warehouse is that which animates all persons who store in a public warehouse, viz., to have some person in charge and in keeping of the goods and responsible therefor. Another reason for the storage is to avoid payment of government taxes until a sale has been secured for the product stored. It would seem that a person engaged in the liquor business to any extent would undoubtedly have to engage in these particular acts in order to so engage in business.

The Legislature of Kentucky, under the Constitution of the State, has the undoubted right to single out a business and impose an occupational tax on such business, and unless the definition and selection of the business made by the Legislature is so arbitrary and capricious as to be unreasonable, the courts are not justified in declaring the act of the Legislature illegal.

In the case of *Female Academy v. Sutherland*, 116 Ill. Reports (Freeman), 375, the court was called upon to define the meaning of the words "doing business in this State." The court used this language:

"Receiving lands in this State by devise, and the assertion in the State of ownership over them

we regard a sufficient doing business in this State to bring appellant within the purview of this language of the section."

In the case of *Pennsylvania v. Bauerle*, 143 Ill. Reports, 459, the court, in construing the same statute referred to in the case above, used this language:

"So here, receiving the land adjoining Chicago by devise, with power to sell, and dispose of same, and the power to lease it and to collect the rents and profits therefrom, and the assertion in this State of the ownership of said land and assuming to sell and convey it, and bringing suits in the courts of this State in respect to said land and such alleged ownership, and for the enforcement of contracts in regard to same, must be held to be doing business in this State within the purview of this section."

While it is true that the two opinions just referred to were not construing a statute imposing a tax on doing business, still they illustrate how far the courts have gone in holding that certain acts constituted doing business within the State.

The case of *Greene v. Kentenia Coal Corporation*, 175 Ky. 661, was a case in which the question involved was the right of the Commonwealth to collect from a company which merely owned land in Kentucky a license tax under the provisions of Section 4189e and 4189d, Kentucky Statutes.

These sections of the statute impose a license tax of fifty cents on each one thousand dollars of the authorized capital stock of corporations represented by property owned and business transacted in Ken-

tucky. The Kentenia Coal Corporation claimed that it was not liable for the tax because it was doing no business in Kentucky, but was merely owning and holding land. The Court was called upon to pass upon the question whether or not owning land in Kentucky was doing business in this State. It was contended by the company that merely owning land was not doing business, but that it would have to be putting the land to some use. The Court, in answer to that contention, used this language:

"But we do not construe that phrase to be confined to such a narrow meaning. When plaintiff invested its capital in the coal and timber land which it purchased in this State, it did so for one of two purposes—that of speculation by holding the land until it naturally increased in price, or to reap a profit from it by operating it either in the way of cultivation, mining, getting timber from it, or otherwise, so as to make it profitable. It avers in its pleading that it is doing neither of the latter, and therefore it is not doing business in this State. But, according to our conception, the land need not be in actual use in order to constitute *doing business*. The average speculator in land (and there are many of them) if asked in what business he was engaged would answer, 'speculating in land.'

"One of the definitions of business given by Mr. Webster is 'buying and selling,' and when one, either as an individual or corporation, puts his money into land rather than other investments, his act is necessarily a choice between the various means open to him by which he may make his money yield him a profit.

"One of the definitions of 'invest' as given

by Mr. Webster, is 'To lay out (money or capital) in business with the view of obtaining income or profit,' and to employ capital by investing it in land and not using the land is, according to our view, doing business within the sense of that term as used in the statute providing for the tax sought to be enjoined. Furthermore, a constituent part of the legal definition given by us in the case of *Larkin v. Commonwealth*, 172 Ky. 106, 189 S. W. 3, of 'doing business' is: 'In other words, business does not mean dry goods, nor cash, nor iron rails and coaches. Business is not these lifeless and dead things, but the activities in which they are employed. When in motion, then the owners are said to be in business.'

"As seen, plaintiff employed its capital by investing it in real estate situated within this State. It then put its capital in motion, and as long as it remains so invested it is doing business for its owner."

From the authorities quoted, we therefore think that, viewing the law either as imposing one tax on the entire business of distilling, storing in bonded warehouses and removing liquors therefrom, or as imposing a separate tax on each of said activities, it is fully justified under Section 181 of the Constitution of Kentucky.

**THE ACT IN QUESTION DOES NOT VIOLATE SECTION 171 OF THE CONSTITUTION OF KENTUCKY.**

We think the contention of the appellee that the act in question violates Section 171 of the Constitution of Kentucky, which requires uniformity of taxation, is without any merit whatever. As before stated, and as shown by the authorities quoted, this is not a property tax, but purely an occupational tax or an excise tax. Section 171 of the Constitution of Kentucky is as follows:

“The General Assembly shall provide by law an annual tax, which, with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws.”

It will thus be seen that the uniformity required by Section ~~171~~<sup>171</sup> of the Constitution is uniformity in *ad valorem* taxation, and not in license taxation. One of the most instructive cases on the question as to whether or not Section 171 of the Constitution of Kentucky, requiring uniformity of taxation, applies to license taxes levied under Section 181 of the Constitution of Kentucky is the case of Hager, Auditor, v. Walker, 128 Ky., page 1. In this case the Court used this language:

“We do not agree with counsel for appellee that the direction in Section 171 that ‘Taxes shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax’ applies directly or specifically to the license fees that may be levied on franchises, stock used for breeding purposes, trades, occupations and professions mentioned in Section 181. Yet it is entitled to serious consideration as indicating the purpose that all laws imposing taxes shall operate in a uniform manner, to the end that no favoritism can be shown or discrimination be practiced. Section 171 authorizes the imposition of an *ad valorem* tax upon all the property in the State for State purposes, and in counties, cities, towns and taxing districts for local purposes. This *ad valorem property tax*, whether imposed or levied for State, county, municipal or local purposes, must be uniform within the territory in which it is imposed.”

In the same opinion the Court, in discussing the authority to impose license taxes, under Section 181 of the Constitution of Kentucky, used this language:

“The authority to tax under this section is as far-reaching and as sweeping as language can make it. It would be difficult to find three words that cover wider fields of employment than ‘trades,’ ‘occupations’ and ‘professions.’ Under its authority to tax them the General Assembly has the power and the right to tax every business and every individual in the State—the merchant, trader and banker; the lawyer, minister and doctor; the mechanic and farmer. Indeed, it would be difficult to mention a person who has not some trade, occupation or profession, and if he has, the authority to tax him is granted and this

without respect to the nature or character of the trade, occupation or profession, or whether it be humble, or great, large or small. Nor does the Constitution undertake to place any limitation upon the amount of tax that may be imposed, although it may be conceded that if it shall be so unreasonable or arbitrary as to amount to a confiscation of property or a denial of the right to engage in a particular trade, occupation or profession, the courts would interpose to protect the class of persons affected from this oppressive burden, on the ground that it was a violation of the principles recognized and established in the Bill of Rights, declaring that all men have the right of seeking and pursuing their safety and happiness and the right of acquiring and protecting property."

Further along in the same opinion the Court used this language:

"We believe that it is competent for the Legislature under this section by general laws, for State purposes, as well as by a general law delegating the power to the municipalities mentioned, to divide trades, occupations and professions into classes and to impose a different license fee upon each class that the trade, occupation or profession may fairly and reasonably be divided into. To illustrate: Dealers in hardware might be divided into wholesale and retail dealers. And trades, occupations and professions may be further classified according to the volume of business done by them. Nor is the General Assembly, either by general law for State purposes or general law in aid of or for the benefit of municipalities, required to impose the license fees that *may be* levied upon all trades, occupations and professions. *Any one or*



*more trades, occupations and professions may be singled out for taxation, and all the others not thus selected be exempted.* It will thus be seen that according to our construction of this section it is susceptible of wide and varying application." (The italics used are ours.)

This opinion establishes beyond any sort of question that the uniformity of taxation referred to in Section 171 of the Constitution of Kentucky is taxation upon property, and not license taxation upon trades and occupations. It also establishes beyond any sort of question that the Legislature may not only single out and tax one occupation and fail and refuse to tax all other occupations, but it even can go to the extent of classifying the persons engaged in the one occupation which is taxed, and if that classification is along reasonable and just lines, it will be sustained.

Therefore, the contention of the appellee that the law imposes unequal taxation and violates Section 171 of the Constitution of Kentucky is without merit. There is only one ground upon which it can be held that the act violates Section 171 of the Constitution of Kentucky, and that is for the Court to hold that it is a property tax and not an occupational tax. For the Court to reach such a conclusion as this would be to go at variance with the plainly expressed purpose and intention of the Legislature.

The opinion in the case of *Hager v. Walker*, *supra*, answers with equal force the contention of the appellee that the act is discriminatory in its nature

and adds a greater burden on whiskey than on other personal property, as well as the contention of the appellee that it adds a bigger burden on the business taxed, if it be an occupational tax, than on other businesses of like character. Other cases following the case of *Hager v. Walker*, *supra*, are:

Gordon v. City of Louisville, 138 Ky. 444.

City of Louisville v. Sagalowski & Son, 136 Ky. 328.

Strater Bros. Tobacco Co. v. Commonwealth, 117 Ky. 603.

Weyman v. City of Newport, 153 Ky. 490.

#### **DO THE PENALTIES FOR VIOLATION OF THE ACT IN QUESTION MAKE IT INVALID?**

The bill in this case does not specifically raise the question as to whether or not the penalties provided for in the law for a violation of its terms make the law invalid by reason of being excessive. The lower Court, however, in this case adopted the opinion rendered by the lower Court in the Western District of Kentucky in case No. 582, now pending in this Court, wherein Charles I. Dawson, Attorney General, *et al.*, are the appellants and The J. & A. Freiburg Company, Incorporated, is the appellee; and one of the main reasons given in the opinion of the lower Court in the last case above referred to for holding the law invalid was that the penalties provided for in the law are so excessive as to render the whole act invalid. For this reason we wish to briefly discuss this question.

As stated at the outset in this brief, we think that the appellee is afforded an adequate and safe method of testing the law under Section 162 of Kentucky Statutes, without incurring any risk either of penalties or loss. It is the universal rule that where a means is furnished by which a law may be safely tested without the person testing same incurring the penalties, in event he loses in the test, substantial penalties may be imposed. We think it safe to say that an act otherwise valid has never been held invalid on account of penalties alone, unless there exists the further fact that the person subject to the provisions of the law is afforded no means of testing same without incurring the risk of having to pay the penalties.

St. Louis, I. M. & S. Railway Co. v. Williams, *et al.*, 40 Supreme Court Rep. 71.

Waddy v. Southern Railway Co., 235 U. S. 67, 59 L. Ed. 405.

Gulf, Colorado & Santa Fe Railway Co. v. State of Texas, 246 U. S. 58, 62 L. Ed. 574.

Assuming that Section 162 of the statutes of Kentucky, hereinbefore referred to, affords an adequate and safe means of testing the act in question without incurring the risk of the penalties, it can not be said that the penalties for a violation of the act are excessive and unreasonable. The court must look to the object intended to be accomplished by the imposition of the penalties. It is evident that the act intended to make the liquor itself part security for the collec-

tion of the tax imposed by the act, and unless the penalties were heavy, the temptation would be very strong for the owners of large quantities of liquor stored in bonded warehouses in Kentucky to remove same from such warehouses between two reporting dates, without the payment of the tax, and all that the State would have left to secure it in the tax would be a claim against the warehouseman, secured by a lien against such property as he owned and used in connection with the warehouse. Certainly, in view of this situation, the State is justified in imposing such penalties for failure to report and promptly pay the tax as would minimize the danger of having the whiskey removed without satisfying the tax for which it stands in lien.

Furthermore, we think that the section of the statute which imposes the penalties may be considered as separable, and may be adjudged to be invalid without affecting the rest of the law. While undoubtedly the Legislature considered the imposition of the penalties as an important part of the statute, as a means of collecting the tax, we do not think it can with reason be held that the Legislature regarded the penalties as so vital as that the law would not have been passed without the penalty provision.

**THE TAX IMPOSED BY THE ACT DOES NOT PLACE  
SUCH A BURDEN ON INTERSTATE COM-  
MERCE AS TO VIOLATE ARTICLE 1, SECTION  
8, CLAUSE 3, OF THE CONSTITUTION OF THE  
UNITED STATES.**

We now come to that contention of appellee which we deem its most serious objection to the validity of the law, that is, the claim that so much of the law as imposes a tax of fifty cents on each proof gallon of whiskey transported in bond out of the State of Kentucky into another State is a tax or burden on interstate commerce and violates the Federal Constitution, and that by reason of the alleged invalidity of the act in this respect the whole law is invalid. The opinion in the Freiburg case, which was adopted by the lower Court as the opinion in the case at bar, does not pass on this question in any way whatever. This fact is probably due to the further fact that in the Freiburg case no question of interference with interstate commerce was raised in the bill. Nor was any such contention urged in the lower Court in the argument of the Freiburg case. The short, separate opinion rendered by the lower Court in the case at bar, and found on page 52 of the Transcript of Record, asserts that the tax imposed by the law in question is a property tax, and the same general theory runs through the entire opinion in the Freiburg case. We think such a construction of the law is utterly at variance with the plainly expressed purpose of

the Legislature. We think, in view of past legislation by Kentucky of a very similar character, and heretofore referred to in this brief, the Court must reach the conclusion that the law is an attempt on the part of the Legislature to impose an occupational or excise tax under Section 181 of the Constitution of Kentucky, and can be justified only upon that theory. Assuming it, however, to be a property tax—which we do not concede—the claim of appellee that as a property tax it is a burden upon interstate commerce is utterly without merit. The entire record in this case shows that the whiskey which we claim is merely the criterion by which to measure the amount of tax, and which appellee claims is the subject taxed, was manufactured in Kentucky and after manufacture remained in Kentucky. It was and is a part of the general mass of taxable property of the State. This being true, the right of the State to tax it continues unimpaired until it starts on its ultimate journey in interstate commerce, or until it is delivered to and received by a common carrier for movement in interstate commerce.

In the case of *Coe v. Errol*, 116 U. S. 517, 29 L. Ed. 715, the Supreme Court, speaking through Mr. Justice Bradley, used this language:

“But no definite rule has been adopted with regard to the point of time at which the taxing power of the State ceased as to goods exported to a foreign country or to another State. What we have already said, however, in relation to the

products of a State intended for exportation to another State would indicate the view which seems to us the sound one on that subject, namely, that such goods do not cease to be a part of the general mass of property in the State, subject as such to its jurisdiction and to taxation in the usual way, until they have been shipped or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey. We think that this must be the true rule on the subject. It seems to us untenable to hold that a crop or herd is exempt from taxation merely because it is, by its owner, intended for exportation. If such were the rule in many States, there would be nothing but the lands and real estate to bear the taxes. Some of the Western States produce very little, except wheat and corn, most of which is intended for export; and so of cotton in the Southern States. Certainly, as long as these products are on the lands which produce them, they are part of the general property of the State. And so we think they continue to be until they have entered upon their final journey for leaving the State and going into another State. It is true, it was said in the case, *The Daniel Ball*, 10 Wall. 557, 565, 19 L. Ed. 1002: 'Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced.' But this movement does not begin until the articles have been shipped or started for transportation from one State to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence is no part of that journey."

This opinion was quoted with approval in the case of *Diamond Match Co. v. Village of Ontonagon*, 188 U. S. 82, 47 L. Ed. 339. The rule announced in these two cases is so well established that we consider further citation of authority unnecessary. Therefore, if this tax is viewed as a property tax upon whiskey, and not as an occupational tax, the contention that it is a burden upon interstate commerce or an interference with interstate commerce is completely answered.

It is important, however, to determine whether or not the tax imposed by the law in question is an interference with interstate commerce when the law is viewed in its true character, namely, as an occupational or excise tax. We have heretofore endeavored to show that the real purpose of the law is to tax the one entire, continuous business of the manufacture and preparation of distilled spirits for market. As has already been suggested, this tax is attempted to be imposed upon that business done in Kentucky, and every separate act in the manufacture and preparation of whiskey for market, including its storage in warehouses and release therefrom in order to place same in commerce, is done in Kentucky. No attempt by this law is made to place any tax or any burden upon any act in connection with the business after the liquor produced in said business has been placed in the channels of interstate commerce. The manufacturing, which is a part of the business taxed; the storing in warehouses, which is a part of the busi-



products of a State intended for exportation to another State would indicate the view which seems to us the sound one on that subject, namely, that such goods do not cease to be a part of the general mass of property in the State, subject as such to its jurisdiction and to taxation in the usual way, until they have been shipped or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey. We think that this must be the true rule on the subject. It seems to us untenable to hold that a crop or herd is exempt from taxation merely because it is, by its owner, intended for exportation. If such were the rule in many States, there would be nothing but the lands and real estate to bear the taxes. Some of the Western States produce very little, except wheat and corn, most of which is intended for export; and so of cotton in the Southern States. Certainly, as long as these products are on the lands which produce them, they are part of the general property of the State. And so we think they continue to be until they have entered upon their final journey for leaving the State and going into another State. It is true, it was said in the case, *The Daniel Ball*, 10 Wall. 557, 565, 19 L. Ed. 1002: 'Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced.' But this movement does not begin until the articles have been shipped or started for transportation from one State to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence is no part of that journey."

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ness taxed ; and the removal from bonded warehouses for the purpose of placing the article produced in commerce, are each and all acts done within the territorial limits and jurisdiction of the authority imposing the tax. It makes no difference what may have been the purpose of any person performing any of the various acts connected with the preparation of this product for market. It may have been manufactured for the express purpose of exportation into other States ; it may have been acquired and stored in bonded warehouses in Kentucky for a similar purpose ; it may have been removed from bond in Kentucky for a like purpose, without in any way affecting the right of the State of Kentucky to tax these activities connected with the business.

Coe v. Errol, 116 U. S. 517, 29 L. Ed. 715.

Diamond Match Co. v. Village of Ontonagon,  
188 U. S. 82, 47 L. Ed. 399.

We do not want the Court to lose sight of the proposition that the law in question does not tax the whiskey produced in Kentucky or stored in Kentucky. This is used merely as the measuring rod to determine the amount of tax due by the persons engaged in the tax occupation, and the fact that the whiskey transferred in bond out of the State is used as a criterion to determine the amount of the tax due does not result in a violation of the commerce clause of the Federal Constitution. Had the Legislature seen fit, we are of opinion that it might have

postponed the collection of the tax on that portion of the business represented by the liquor transferred under bond out of Kentucky and placed in bonded warehouses in other States until that liquor had been freed from bond in such other States. This procedure would not have resulted in imposing any unlawful burden on interstate commerce.

Taking the act as a whole, we think it can be safely said that the law does not tax the act of transferring whiskey in bond out of Kentucky, but it simply requires the payment of the license tax before the removal of the whiskey from the jurisdiction of the State. The Legislature evidently concluded that the State should collect its tax before the property which stood in lien for it passed beyond its jurisdiction. This requirement that the tax shall be paid before the property which stands in lien for it passes beyond the jurisdiction of the State, in our judgment can not be viewed as an unwarranted interference with interstate commerce. It is merely a precautionary measure to protect the State in the collection of its tax arising upon the business which produced the whiskey.

In the case of *American Manufacturing Company v. St. Louis*, 250 U. S. 459, a West Virginia corporation was engaged in manufacturing in the city of St. Louis, Mo. An ordinance of that city imposed a license tax on manufacturers conducting their business within the city. This was to be ascertained by and proportionate to the amount of sales of the

manufactured goods, whether sold within or without the State, and the payment was to be deferred until the goods so manufactured had been sold. The corporation shipped some of the goods manufactured by it in St. Louis to storage warehouses in other States, and from these warehouses sold such stored goods to customers in States other than Missouri. The company raised the objection that to require it to pay a license tax in St. Louis, measured in part by sales made in other States, was an unwarranted interference with interstate commerce. The Supreme Court, speaking through Mr. Justice Pitney, in respect of this contention, used this language:

“In our opinion, the operation and effect of the taxing ordinance are to impose a legitimate burden upon the business of carrying on the manufacture of goods in the city; it produces no direct burden on commerce in the goods manufactured, whether domestic or interstate, and only the same kind of incidental and indirect effect as that which results from the payment of property taxes or any other and general contribution to the cost of government. Therefore, it does not amount to a regulation of interstate commerce. And for like reasons, it has not the effect of imposing a tax upon the property or the business transactions of plaintiff in error outside of the State of Missouri, and hence does not deprive plaintiff in error of its property without due process of law. Our recent decisions cited in opposition to this view: *Crew-Levick Co. v. Pennsylvania*, 245 U. S. 292-297; *Looney Co. v. Crane Co.*, 245 U. S. 178-188, and

other cases of the same kind referred to therein, are so obviously distinguishable that particular analysis is unnecessary."

See also:

U. S. Glue Co. v. Oak Creek, 247 U. S. 321.  
Underwood Typewriter Co. v. Chamberland, 41  
Sup. Ct. Rep. 45.

Under the principle announced in the cases, the law in question is not open to the objection that it violates the commerce clause of the Federal Constitution.

### **THE LAW DOES NOT VIOLATE THE PROVISIONS OF TITLE II OF THE VOLSTEAD ACT.**

We come now to the last contention of appellee that the law violates Title II of the National Prohibition Act, passed October 28, 1919, which provides the terms and conditions on which whiskey may be withdrawn from bonded warehouses or transported in bond from one State to another. We do not believe that this contention is seriously urged by appellee. There is nothing in the entire Volstead Act that would indicate a prohibition against the State taxing the business of manufacturing and preparing whiskey for market. It is true that it is provided in Title II of the Volstead Act:

"\* \* \* That nothing in this act shall prohibit the purchase and sale of warehouse receipts covering distilled spirits on deposit in

government bonded warehouses, and no special tax liability shall attach to the business of purchasing and selling such warehouse receipts";

but the law in question in this case does not impose any special tax liability on the business of purchasing and selling warehouse receipts. The business taxed is an entirely separate and distinct business, and while the imposition of this tax will probably be taken account of by dealers in their various transactions in buying and selling warehouse receipts, it does not follow that this fact makes it a special tax liability on the business of purchasing and selling warehouse receipts. The Federal government collects \$2.20 upon every gallon of whiskey distilled and stored in bonded warehouses. This tax must be taken into account by dealers in buying and selling warehouse receipts, but no one would attempt to argue that the collection of \$2.20 government tax is prohibited by the section of the Volstead Act above quoted. The government tax is a tax on the privilege of manufacturing whiskey, and not on the business of dealing in warehouse receipts, and there is the same distinction between the tax imposed by the Kentucky law and the business of dealing in warehouse receipts.

In conclusion, we submit:

1st. That appellee failed to state in its bill facts sufficient to confer jurisdiction upon a court of equity.

2nd. That there is no equity in the bill, and that the appellee has a plain, simple, speedy and adequate remedy at law, and, under the well-established principles, often announced by this court it should not be allowed to stay and embarrass the collecting agencies of the State under these conditions.

3rd. That the pendency of proceedings in the State court, accompanied by a stay of proceedings therein, requires the Federal court to withhold action until the final determination of the issues in the State court.

4th. That the law imposes an occupational tax, fully authorized under Section 181 of the Constitution of Kentucky.

5th. That it does not violate Section 171 of the Constitution of Kentucky.

6th. That the penalties imposed for a violation of the law do not render the law invalid.

7th. That it does not in any of its provisions impose an unwarranted burden upon interstate commerce.

8th. That the law does not conflict with any of the provisions of the Volstead Act.

Respectfully submitted,

CHAS. I. DAWSON,  
*Attorney General.*

W. T. FOWLER,  
*Assistant Attorney General.*



## APPENDIX.

*AN ACT imposing an annual license tax upon every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits known as whisky or brandy or other species of double stamp spirits in this State, and upon every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in the State, and in removing same therefrom for the purpose of sale, or for any other purpose; providing for monthly reports by distilleries and bonded warehousemen, for the purpose of ascertaining the amount of tax due; providing for monthly payments of the amount of license tax due; fixing a penalty for failure to make such monthly report and settlement; providing for the manner of distribution of the tax so collected; repealing all other license, franchise and excise taxes on the businesses covered by this Act, and declaring an emergency to exist.*

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

1. Every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits, known as whisky or brandy or other species of double stamp spirits, in this State; and every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in this State, and in removing same therefrom for the purpose of sale, or for any other purpose, shall pay an annual license tax to the Commonwealth of Kentucky of fifty cents on every proof gallon of said distilled spirits so manufactured or stored in a bonded

warehouse, or withdrawn from a bonded warehouse, or transferred therefrom under bond out of the Commonwealth of Kentucky.

2. Every corporation, association, partnership and individual owning, controlling or operating a bonded warehouse in this State, wherein distilled spirits known as whisky or brandy or other species of double stamp spirits are stored, shall, on or before the first day of June, 1920, on blanks furnished by the Auditor of Public Accounts, report to the Auditor of Public Accounts the total amount of such spirits stored in a bonded warehouse owned, controlled or operated by such corporation, association, partnership or individual; and shall make monthly reports to the Auditor of Public Accounts thereafter, which reports must be signed and sworn to by such person, or, in case of a corporation, association or partnership, by some officer or person authorized to make such oath. The first report provided for herein shall show the number of proof gallons of such spirits withdrawn from said warehouse from the date this Act becomes effective to the date of making such report; and each monthly report thereafter shall show the number of proof gallons placed in said bonded warehouse since the date of making the last preceding report, the number of proof gallons withdrawn or transferred since the date of making the last preceding monthly report, and the aggregate number of gallons on hand at the date such report is made. In all cases where such spirits are transferred under bond from one bonded warehouse in this Commonwealth to another, said report shall show the warehouse from which same has been transferred and the warehouse to which same has been transferred,

the quantity thereof and the serial number of each of the packages so transferred.

3. Every person, corporation, association or partnership operating, owning or controlling such bonded warehouses, shall, at the time said reports herein provided for are made, pay to the Auditor of Public Accounts the tax of fifty cents per proof gallon upon each proof gallon of such spirits removed from the bonded warehouse owned, controlled or operated by such person, corporation, association or partnership, or transferred under bond out of this State, up to the date of making such report; and for the purpose of securing the payment of the license taxes herein provided for, the Commonwealth shall have a lien on all such spirits stored in such bonded warehouses, together with the other property of the bonded warehousemen used in connection therewith; and in all cases where the spirits so removed or transferred were owned or controlled by another than the bonded warehousemen, then the bonded warehouseman shall collect and pay the tax due on such spirits so removed or transferred under bond, and shall be subrogated to the lien of the Commonwealth.

4. Every corporation, association, partnership and individual engaged in distilling spirits, known as whisky or brandy or other species of double stamp spirits in this State, shall pay the license tax herein provided upon all such spirits so manufactured and removed from the premises without being placed in a bonded warehouse at the date of the removal of such spirits; and all such corporations, associations, partnerships and individuals engaged in the business of distilling such spirits in this State shall file month-

ly statements with the Auditor of Public Accounts, on blanks to be furnished by the Auditor, which statements must be sworn to and which statements shall show the number of proof gallons of such spirits so distilled and removed from the premises without having been stored in a bonded warehouse, and at the time of filing such statements shall pay to the Auditor of Public Accounts the amount due on such spirits so manufactured and removed; and for the payment of the taxes due under this provision, the Commonwealth shall have a lien upon all the machinery and the premises and the manufactured spirits made thereon, of the corporation, association, partnership or individual engaged in such distilling business.

5. Every person, corporation, association or partnership failing to make the reports herein provided for, in the manner herein provided for, and failing to pay the taxes as they become due, as herein provided for, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than five hundred dollars nor more than one thousand dollars, and each day after the date such report is due that such person, corporation, association or partnership is in default shall be treated and considered as a separate offense.

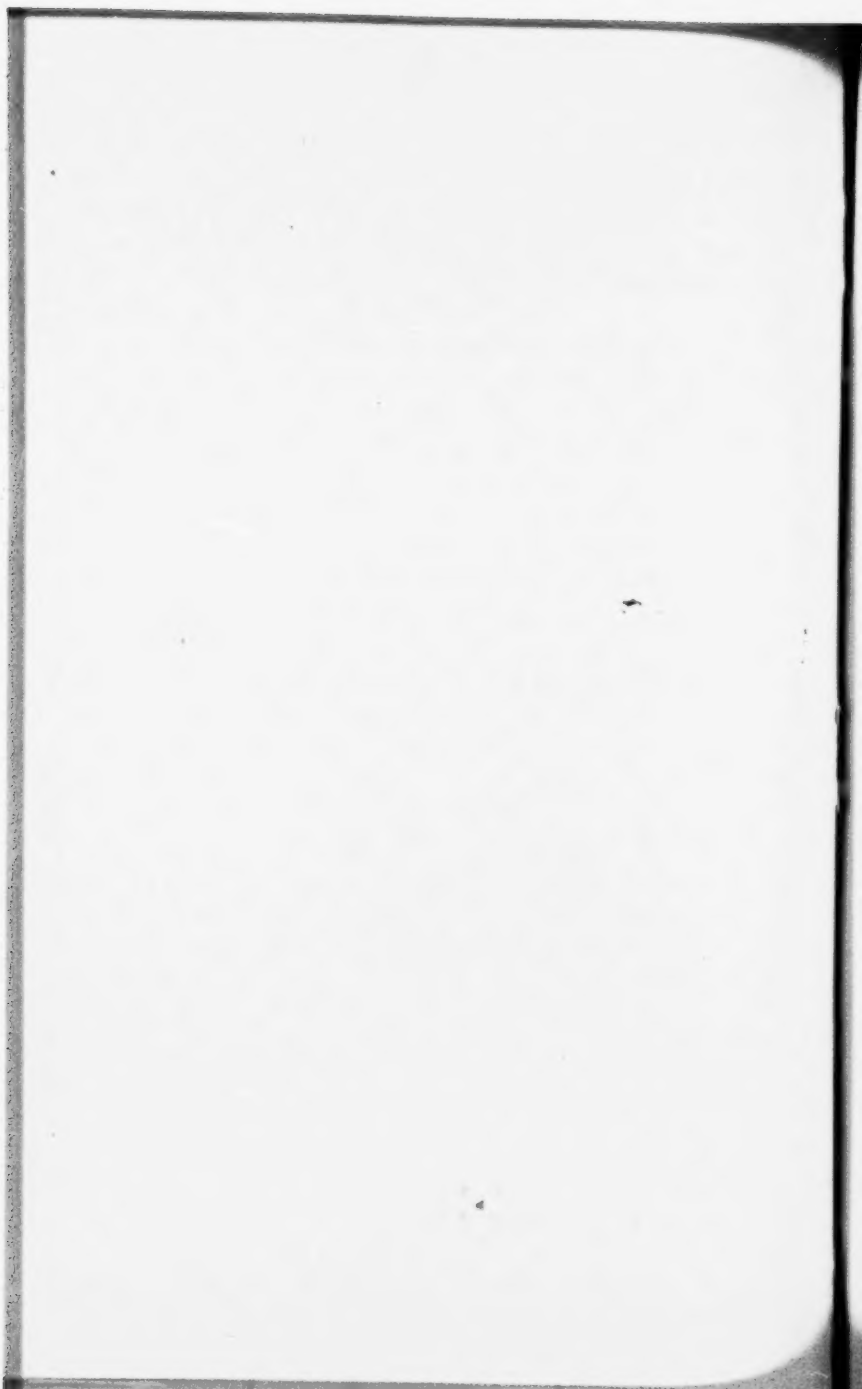
6. The tax herein provided for, when collected, shall be distributed as follows: To the State Road Fund, sixty-five per cent thereof; to the General Expenditure Fund, thirty-five per cent thereof.

7. The license tax herein imposed shall be in lieu of all other license, franchise or excise taxes now imposed by law on persons, corporations, partnerships or associations engaged in business covered by this

Act; and all Acts in conflict therewith are hereby repealed, and especially there is hereby repealed Chapter 5 of the Acts of the Special 1917 Session of the General Assembly of Kentucky.

8. Whereas, many persons, corporations, associations and partnerships are now engaged in the business covered and licensed by this Act, without paying an adequate license tax to the Commonwealth of Kentucky therefor; and whereas, the liquor which they are handling and in which they are dealing is constantly in large quantities being removed from the bonded warehouses and disposed of, without the State securing an adequate license tax thereon, an emergency is hereby declared to exist, and this Act shall take effect from and after the date of its passage and approval by the Governor.





FILE COPY

DEC 10 1920

JAMES D. MAHER,

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1920.

**No. 582.**

---

CHARLES I. DAWSON, Attorney General of the Commonwealth of Kentucky, and individually, LOUISVILLE PUBLIC WAREHOUSE COMPANY, (a corporation), JOHN J. CRAIG, Auditor of the Commonwealth of Kentucky, and individually,  
Appellants,

*versus*

THE J. & A. FREIBURG COMPANY, (Incorporated),  
Appellee.

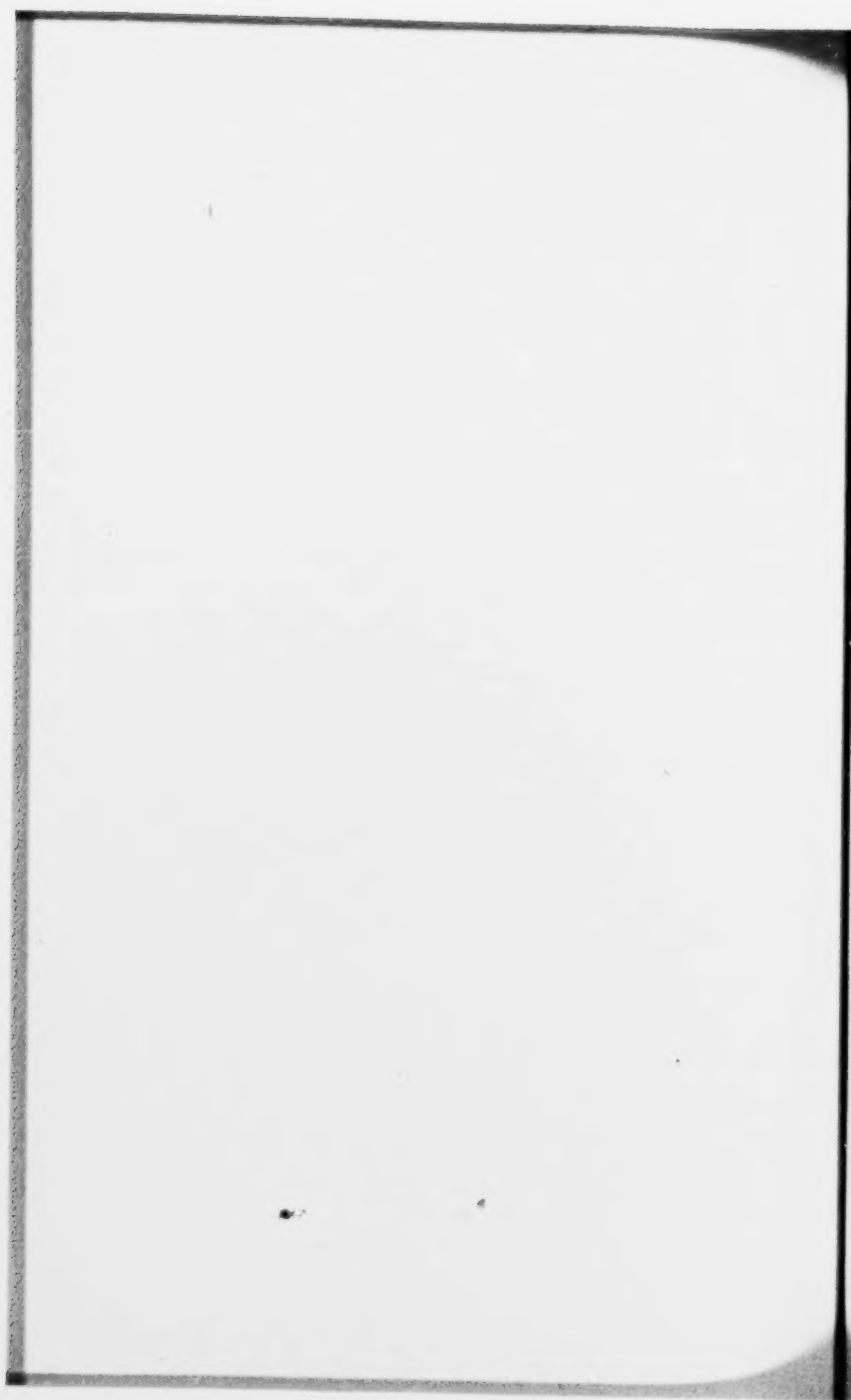
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**BRIEF FOR APPELLANTS.**

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CHAS. I. DAWSON,  
*Attorney General of Kentucky,*  
W. T. FOWLER,  
*Assistant Attorney General.*





# INDEX.

	PAGES
<b>STATEMENT</b> . . . . .	1
<b>ASSIGNMENT OF ERRORS</b> . . . . .	6
<b>PLAINTIFF BELOW HAD AN ADEQUATE REM- EDY AT LAW</b> . . . . .	7
Judicial Code, Sec. 267 . . . . .	8
Dow v. City of Chicago, etc., 11 Wall. 108, 20 L. Ed. 65 . . . . .	8, 15
Indiana Mfg. Co. v. Koehne, 188 U. S. 678, 47 L. Ed. 651 . . . . .	8, 16
Shelton v. Platt, 139 U. S. 591, 35 L. Ed. 273 . . . .	8, 19
Allen v. Pullman Palace Car Co., 139 U. S. 658, 35 L. Ed. 303 . . . . .	8, 19
Boise Artesian Hot & Cold Water Co. v. Boise City, 213 U. S. 273, 53 L. Ed. 796 . . . . .	8, 21
Singer Sewing Machine Co. v. Benedict, 229 U. S. 478, 57 L. Ed. 1288 . . . . .	8, 23
Arkansas Building & Loan Ass'n v. Madden, 175 U. S. 269, 44 L. Ed. 159 . . . . .	8, 23, 29
Kentucky Statutes, Sections 162 and 163 . . . . .	8
Craig, Auditor, v. Security Producing & Refining Co., decided Nov. 16, 1920 (Ky) . . . . .	9
Green, Auditor, v. Taylor, 184 Ky. 739 . . . . .	9
Craig, Auditor, v. Frankfort Distilling Co., de- cided Nov. 23, 1920 (Ky) . . . . .	14
Ex Parte Young, 209 U. S. 122, 52 L. Ed. 714 . . . .	25
Union Pacific R. R. Co. v. Weld County, 247 U. S. 282 . . . . .	28

	PAGES
<b>THE PROCEEDING SHOULD HAVE BEEN ABATED . . . . .</b>	29
Judicial Code, Sec. 266. . . . .	30
<b>THE TAX IMPOSED BY THE ACT IN QUESTION IS AN OCCUPATIONAL OR EXCISE TAX AND JUSTIFIED UNDER THE KENTUCKY CONSTITUTION . . . . .</b>	32
Kentucky Constitution, Sec. 181. . . . .	32
Act of 1917 (General Assembly of Kentucky) . . . . .	33
Greene, Auditor, v. Taylor & Sons, 184 Ky. 742. . . . .	33
Raydure v. Board of Supervisors Estill County, 183 Ky. 84 . . . . .	33
Brown-Forman Co. v. Kentucky, 217 U. S. 551, 54 L. Ed. 883 . . . . .	34
Locke v. City of New Orleans, 4 Wall. 172, 18 L. Ed. 334 . . . . .	35
League v. Texas, 184 U. S. 156, 46 L. Ed. 478. . . . .	35
Kentucky Union Co. v. Kentucky, 219 U. S. 140, 55 L. Ed. 137 . . . . .	35
Cooley on Taxation, 3rd Edition, Vol. 1, 492. . . . .	35
Billings v. United States, 232 U. S. 261, 58 L. Ed. 596 . . . . .	35
Female Academy v. Sutherland, 116 Ill. Rep. (Freeman) 375 . . . . .	39
Pennsylvania v. Bauerle, 143 Ill. Rep. 461. . . . .	39

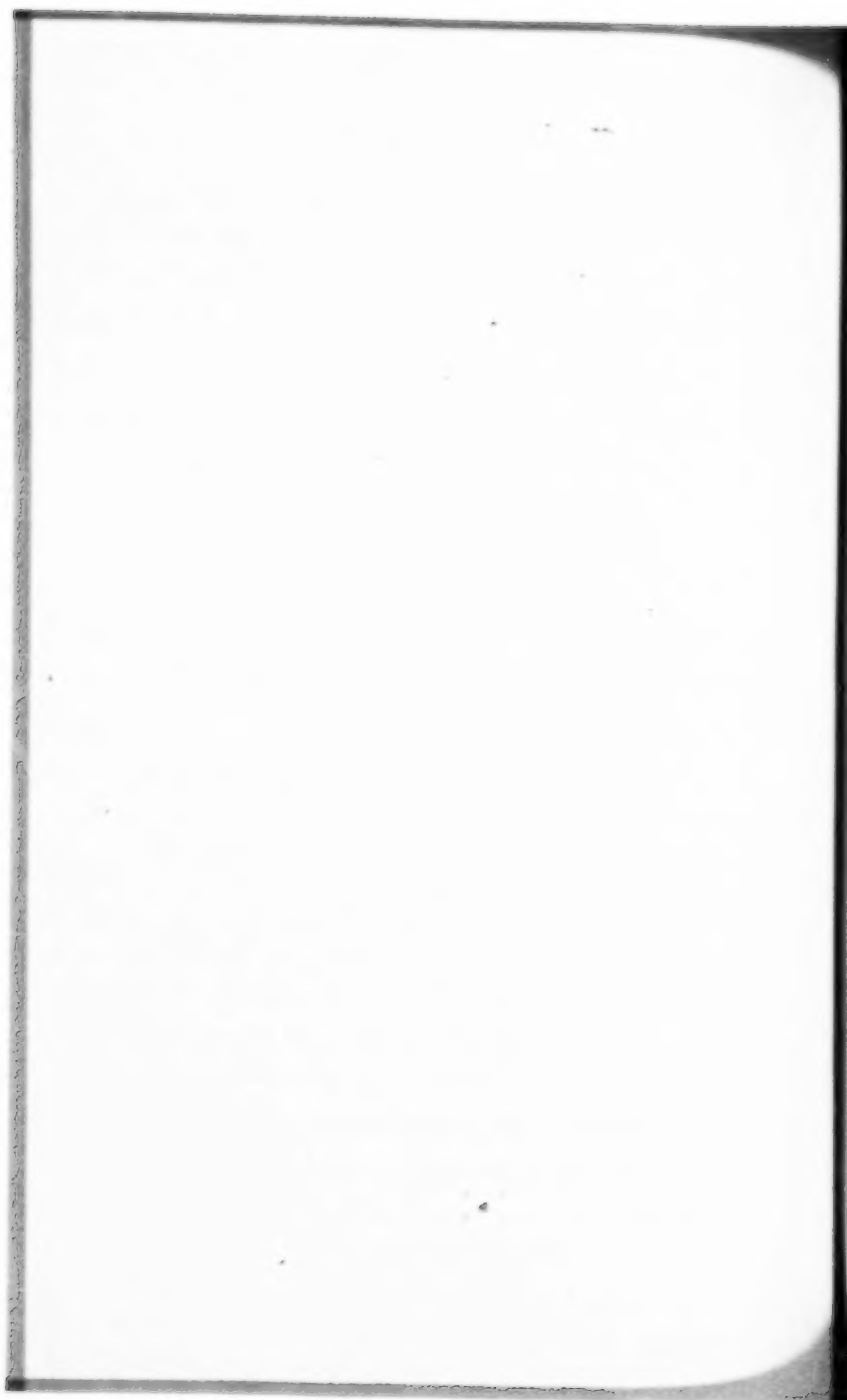
	PAGES
<b>DO THE PENALTIES FOR VIOLATION OF THE ACT IN QUESTION MAKE IT INVALID?...</b>	40
St. Louis, I. M. & S. Railway Co. v. Williams, et al., 40 Supreme Court Rep. 71.....	41
Waddy v. Southern Railway Co., 235 U. S. 67, 59 L. Ed. 405 .....	41
Gulf, Colorado & Sante Fe Railway Co. v. State of Texas, 246 U. S. 58, 62 L. Ed. 574.....	41
<b>IS THE APPELLEE DENIED THE EQUAL PRO- TECTION OF THE LAW GUARANTEED BY THE FOURTEENTH AMENDMENT .....</b>	42
Brown-Forman Co. v. Kentucky, 217 U. S. 551, 54 L. Ed. 883.....	43
<b>IS THE TAX CONFISCATORY? .....</b>	44
McCray v. United States, 195 U. S. 27, 49 L. Ed. 61	44
In re License Tax Cases, 5 Wall. 463, 18 L. Ed., 497	45
Pacific Insurance Co. v. Soule, 7 Wall. 433, 19 L. Ed. 95 .....	45
Austin v. Boston, 7 Wall. 694, 19 L. Ed. 224.....	45
Kentucky Constitution, Sec. 181.....	45
<b>APPENDIX .....</b>	63

## AUTHORITIES CITED.

	PAGES
Allen v. Pullman Palace Car Co., 139 U. S. 658, 35 L. Ed. 303 .....	8, 19
Arkansas Building & Loan Ass'n v. Madden, 175 U. S. 269, 44 L. Ed. 159.....	8, 23, 29
Act of 1917 (Kentucky) .....	33
Austin v. Boston, 7 Wall. 694, 19 L. Ed. 224.....	45
Boise Artesian Hot & Cold Water Co. v. Boise City, 213 U. S. 273, 53 L. Ed. 796.....	8, 21
Brown-Forman Co. v. Kentucky, 217 U. S. 551, 54 L. Ed. 883 .....	43
Billings v. United States, 232 U. S. 261, 58 L. Ed. 596 .....	35
Craig, Auditor, v. Security Producing & Refining Co., decided Nov. 6, 1920 (Ky.).....	9
Craig, Auditor, v. Frankfort Distilling Co., decided Nov. 23, 1920 (Ky.) .....	14
Cooley on Taxation, 3rd Edition, Vol. 1, 492.....	35
Dow v. City of Chicago, etc., 11 Wall. 108, 20 L. Ed. 65. . . . .	8, 15
Ex Parte Young, 209 U. S. 122, 52 L. Ed. 714.....	25
Female Academy v. Sutherland, 116 Ill. Rep. (Freeman) 375 .....	39
Greene, Auditor, v. Taylor, 184 Ky. 739.....	9
Greene, Auditor, v. Taylor & Sons, 184 Ky. 742.....	33
Gulf, Colorado & Santa Fe R'y Co. v. State of Texas, 246 U. S. 58, 62 L. Ed. 574.....	41
Indiana Mfg. Co. v. Koehne, 188 U. S. 678, 47 L. Ed. 651 .....	8, 16

v

	PAGES
In re License Tax Cases, 5 Wall. 463, 18 L. Ed. 497 . .	45
Judicial Code, Sec. 267 . . . . .	8
Judicial Code, Sec. 266 . . . . .	30
Kentucky Statutes, Sections 162 and 163 . . . . .	8
Kentucky Constitution, Sec. 181 . . . . .	32, 45
Kentucky Union Co. v. Kentucky, 219 U. S. 140, 55 L. Ed. 137 . . . . .	35
Locke v. City of New Orleans, 4 Wall. 172, 18 L. Ed. 334 . . . . .	35
League v. Texas, 184 U. S. 156, 46 L. Ed. 478 . . . . .	35
McCray v. United States, 195 U. S. 27, 49 L. Ed. 61 . .	44
Pennsylvania v. Bauerle, 143 Ill. Rep. 461 . . . . .	39
Pacific Insurance Co., v. Soule, 7 Wall. 463, 19 L. Ed. 95 . . . . .	45
Raydure v. Board of Supervisors Estill County, 183 Ky. 84 . . . . .	33
Shelton v. Platt, 139 U. S. 591, 35 L. Ed. 273 . . . . .	8, 19
Singer Sewing Machine Co. v. Benedict, 229 U. S. 478, 57 L. Ed. 1288 . . . . .	8, 23
St. Louis, I. M. & S. Railway Co. v. Williams, etc., 40 Supreme Court Rep. 71 . . . . .	41
Union Pacific R. R. Co. v. Weld County, 247 U. S. 282	28
Waddy v. Southern Railway Co., 235 U. S. 67, 59 L. Ed. 405 . . . . .	41



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1920.

No. 582.

---

CHARLES I. DAWSON, ATTORNEY GENERAL  
OF THE COMMONWEALTH OF KENTUCKY,  
ET AL., - - - - - *Appellants,*

*versus* **BRIEF FOR APPELLANTS.**

THE J. & A. FREIBURG COMPANY (Incor-  
porated), - - - - - *Appellee.*

---

**STATEMENT.**

At the regular 1920 Session of the General Assembly of the Commonwealth of Kentucky there was passed by the Assembly, and approved by the Governor on the 12th day of March, 1920, an act entitled:

"AN ACT imposing an annual license tax upon every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits known as whiskey or brandy or other species of double stamp spirits in this State, and upon every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in the State, and in removing same therefrom for the purpose of sale, or for any other purpose; providing for monthly reports by distilleries and bonded warehousemen, for the purpose of ascertaining the



amount of tax due; providing for monthly payments of the amount of license tax due; fixing a penalty for failure to make such monthly report and settlement; providing for the manner of distribution of the tax so collected; repealing all other license, franchise and excise taxes on the business covered by this act, and declaring an emergency to exist."

This act is quoted in full in the appendix to this brief, beginning with page 63 hereof. The act carried an emergency clause, which, under the provisions of Section 55 of the Constitution of Kentucky, made it operative immediately upon its approval by the Governor. The law required those subject to its provisions, on or before the 1st day of June, 1920, and on the first day of each month thereafter, to file reports with the Auditor of Public Accounts, showing the amount of tax due on the respective filing dates, and at the same time such reports were filed it was required that payment should be made to the Auditor of the tax due as of the respective filing dates. Before the first report provided for in the act was due, the appellee, The J. & A. Freiburg Company, filed in the District Court of the United States for the Western District of Kentucky its bill in equity against the Louisville Public Warehouse Company, John J. Craig, Auditor of the Commonwealth of Kentucky, and Charles I. Dawson, Attorney General of the Commonwealth of Kentucky, attacking the validity of this law. The bill is found on pages 2 to 17, both inclusive, of the printed transcript of the record.

It is charged in the bill that The J. & A. Freiburg Company, the appellee herein, was, prior to January 1, 1920, a wholesale liquor dealer, with its place of business in Cincinnati, Ohio; that in the course of its business it acquired title, through the purchase of negotiable warehouse receipts, to a quantity of whiskey, which, at the time of the filing of the bill, was stored in the bonded warehouse of the appellant, Louisville Public Warehouse Company, in Louisville, Kentucky; that it was desirous of transferring said liquor from the bonded warehouse in Kentucky to a public bonded warehouse in Boston, Massachusetts, and, for the purpose of effecting such removal, it tendered to the warehouse company in Kentucky all charges for storage and taxes due on same, other than the fifty-cent tax assessed by the act in question. It is alleged in the bill that the Louisville Public Warehouse Company refuses to release said whiskey for such transfer in bond, unless the fifty-cent tax provided for by the act of 1920 is also paid.

The appellants, John J. Craig, Auditor of the Commonwealth of Kentucky, and Charles I. Dawson, Attorney General of the Commonwealth of Kentucky, were made parties defendant to the bill, on the ground that they were the authorities charged with the enforcement of the law and were threatening to and would enforce same, unless enjoined and restrained by the court from so doing.

It is claimed in the bill that the appellee is not engaged in any business in Kentucky, in contempla-

tion of Section 181 of the Constitution of Kentucky, which authorizes the Legislature to impose license taxes on trades, occupations and businesses, and to impose a special or excise tax; that for the Commonwealth of Kentucky to levy or collect, in the form of a license tax or otherwise, fifty cents per proof gallon on whiskey would be to work an unjust discrimination against the owners of liquor stored in Kentucky, and would destroy and confiscate the appellee's property, and would deprive the appellee of its property without due process of law, and deny to appellee the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States; that the acts also violates the 13th section of the Bill of Rights of the Constitution of the State of Kentucky, which prohibits property being taken or applied to public use without the consent of the owner and without just compensation being previously made therefor; that it likewise violates Section 14 of the Bill of Rights of the Constitution of the State of Kentucky, which provides that the courts shall be always open and that every person, for any injury done him in his lands, goods or personal reputation, shall have remedy by due course of law; that the act, by creating a statutory lien in behalf of the Commonwealth for the amount of the tax, casts a cloud upon the title to the property of the appellee, and that, unless the appellants, the Auditor and the Attorney General, were enjoined and restrained from attempting to enforce the law, a mul-

tiplicity of suits would result, against which plaintiff would have no adequate remedy at law, and that great and irreparable injury would result to the appellee, unless the court by its injunctive process restrained the enforcement and collection of the claims, taxes and penalties provided for in the law.

In accordance with the provisions of Section 266 of the Judicial Code, after notice had been duly given, a motion was made in the District Court of the United States for the Western District of Kentucky before the Hon. A. C. Denison, Circuit Judge, and the Hon. Walter Evans and Hon. J. E. Sater, District Judges, for an interlocutory injunction, restraining the officers of Kentucky above mentioned from attempting to enforce the law. The appellants, Craig and Dawson, appeared and filed a motion to dismiss the bill, for the reason that appellee had an adequate remedy at law, and because the bill did not state facts sufficient to constitute a cause of action against them. Appellants also filed a motion to stay proceedings in the Federal Court, claiming that there was then pending in a court of the State a suit involving the validity of the statute, in which suit a stay of proceedings under the statute had been granted. This motion is found on page 40 of the transcript of record. An answer was also filed by appellants, putting in issue practically all the allegations of the bill, and pleading also the existence of an adequate remedy at law. Numerous affidavits were filed by both parties and proof taken by appellants, all of which was

directed to the question of the prohibitory nature of the tax.

The court below granted the interlocutory injunction. The opinion of the court is found on pages 126 to 153, both inclusive, of the transcript of record, and the injunction granted is found on pages 153 to 155, both inclusive, of the record. The appellants have prosecuted an appeal direct to this court, under the provisions of Section 266 of the Judicial Code.

### **ASSIGNMENT OF ERRORS.**

The formal assignment of errors by appellants will be found on page 165 of the printed record, and, briefly enumerated, the errors complained of are as follows:

1. The court erred in granting the interlocutory injunction.
2. The court erred in holding that the act in question, and attacked in the bill, is unconstitutional and violative of the Kentucky Constitution, and especially in holding that same is void because of excessive penalties imposed for the violation thereof, and in holding that the said tax imposed is not a license or excise tax but a property tax, and in holding that the act is confiscatory and violative of the Constitution of Kentucky.
3. The court erred in refusing to stay proceedings herein pending the determination of the suit brought in the State court involving the validity of the same act.

4. The court erred in holding that equity had jurisdiction of the case, and in holding that there was no adequate remedy at law, and in holding that imminent, irreparable injury was threatened which justified the issuance of an interlocutory injunction and in holding that to enforce the collection of the tax would result in taking plaintiff's property without due process of law.

5. The court erred in refusing to sustain the motion to dismiss the bill in equity.

In this brief we will discuss the questions involved in a different order from that set out in the assignment of errors, as well as that followed by the court below in its opinion.

#### **PLAINTIFF BELOW HAD AN ADEQUATE REMEDY AT LAW.**

The universal rule in the Federal Court is that a court of equity will not allow its injunction to issue to restrain officers from the collection of taxes, except where it may be necessary to protect the rights of citizens whose property is taxed and where there is no adequate remedy by the ordinary processes of the law. The mere unconstitutionality or illegality of the law under which the tax is asserted is not sufficient to authorize the Federal Courts to use their injunctive processes to prevent the enforcement of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, produce irreparable in-

jury, or, where the property of the complainant is real estate, throw a cloud upon the title to the property of complainant and that there is no adequate remedy at law, before the aid of a court of equity may be invoked.

Judicial Code, Sec. 267.

*Dow v. City of Chicago, etc.*, 11 Wall. 108, 20 L. Ed. 65.

*Indiana Mfg. Co. v. Koehne*, 188 U. S. 678, 47 L. Ed. 651.

*Shelton v. Platt*, 139 U. S. 591, 35 L. Ed. 273.

*Allen v. Pullman Palace Car Co.*, 139 U. S. 658, 35 L. Ed. 303.

*Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U. S. 273, 53 L. Ed. 796.

*Singer Sewing Machine Co. v. Benedict*, 229 U. S. 478, 57 L. Ed. 1288.

*Arkansas Building & Loan Ass'n v. Madden*, 175 U. S. 269, 44 L. Ed. 159.

With this statement of the law, which seems to be clearly established, it is important to determine if in the case at bar the appellee has an adequate remedy at law. Sections 162 and 163 of Kentucky Statutes are as follows:

**"SEC. 162. TAXES WRONGFULLY COLLECTED REFUNDED.** When it shall appear to the Auditor that money has been paid into the treasury for taxes when no such taxes were in fact due, he shall issue his warrant on the treasury for such money so improperly paid, in behalf of the person who paid the same. Nothing herein contained shall authorize the issuing of any such warrant in favor of any person who may have made payment of the revenue

tax due on any tract of land, unless it is manifest that the whole of the tax due the Commonwealth on such land has been paid, independent of the mistaken payment, and ought to be reimbursed.

**SEC. 163. TIME IN WHICH TAXES MAY BE REFUNDED.** He shall not draw his warrant for any money improperly paid for taxes, unless application be made in each case within two years from the time when such payment was made."

The Court of Appeals of Kentucky, in construing these two sections of the statute, has held that where the tax was paid directly to the Auditor, or directly into the State Treasury, and where no part of same was due, as when same is paid where there is no warrant in the statutory law of the State for the levy or collection of such taxes, or as when same is paid under a void or unenforceable statute, or through mistake or inadvertence of the taxpayer, it is the duty of the Auditor to refund the taxes so paid. *Greene, Auditor, v. Taylor*, 184 Ky. 739. The last case construing these two sections of Kentucky Statutes is the case of *John J. Craig, Auditor, v. Security Producing & Refining Company*, decided by the Court of Appeals on November/6, 1920, and, inasmuch as it is claimed in the opinion of the lower court that there is some confusion in the opinions of the Court of Appeals of Kentucky construing these two sections of the statute, we think it advisable to quote the opinion referred to, *supra*, in full. It is as follows:



"The Security Producing and Refining Company, a corporation, was assessed by the State Tax Commission and paid into the State treasury a license tax \$750.00, for the year 1918, and a like amount for the year 1919, under Sections 4189a and 4189c, Kentucky Statutes, and is now suing and is granted a mandamus by the lower court against the Auditor, requiring him to draw his warrant on the State treasury for the \$1,500.00 paid by it as tax when no license tax was due by said company at that time on this account. The Auditor is prosecuting this appeal. Section 162, Kentucky Statutes, provides 'when it shall appear to the Auditor that money has been paid into the treasury for taxes when no such taxes were in fact due, he shall issue his warrant on the treasury for such money so improperly paid, in behalf of the person who paid the same. Nothing herein contained shall authorize the issuing of any such warrant in favor of any person who may have made payment of the revenue tax due on any tract of land, unless it is manifest that the whole of the tax due the Commonwealth on such land has been paid, independent of the mistaken payment, and ought to be reimbursed.' In construing this section of the statutes we held in *Greene Auditor v. Taylor*, 184 Ky. 739, 'that taxes voluntarily paid to counties, cities, towns and county officers, collecting the State's revenues and other collecting officers, can not be recovered although not due, and paid under a mistake of law. *City of Louisville v. Anderson*, 79 Ky. 334; *L. & N. R. R. Co. v. Hopkins Co.*, 87 Ky. 605; *L. & N. R. R. Co. v. Commonwealth*, 89 Ky. 531.

"It is conceded that the Security Producing & Refining Company paid, through mistake of law, the taxes for 1918 and 1919 under Sections 4189a and 4189c, when it was required to and

did pay to the State a license tax equal to one per centum of the market value of the crude petroleum produced by it. It thus paid two license taxes when it was liable for only one. When it became liable for the license tax under Section 4223e on its oil production, it was by the provisions of Section 4189a relieved of liability for a license tax upon its capital stock, but it paid both these taxes and now seeks to recover the sum paid as the latter.

"Appellee corporation insists that the attempted assessment of the taxes by the Tax Commission against the corporation was wholly without authority and, therefore, void.

"Fundamentally no tax can be levied or collected by the State, except under and by authority of legislative enactment. Money otherwise received by the State as taxes is unwarranted, and should be returned to the payor upon his compliance with the provisions of Section 163, Kentucky Statutes. It is admitted that the money sought to be recovered in this action, though paid as taxes, was not due as such, and the Security Company by mistake of law paid the same, though unwilling to do so, had it comprehended its legal rights. The attempted assessment made by the State Tax Commission was unwarranted and void because no such license tax was due at that time from the corporation. Money so paid as taxes should be returned to the payor on his timely application. The statutes, Section 162, which provides that when it shall appear to the Auditor that money has been paid into the treasury as taxes when none were in fact due, *shall* be returned to the payor was intended to cover all such cases. Such improper payment of money into the treasury as taxes can not but appear to the Auditor by a glance at the statutes. He does not have to go

into or review the attempted assessment made by the State Tax Commission, but need only to acquaint himself with the facts and look at the statutes imposing the tax on corporations to have it certainly appear to him that money has been paid into the treasury as taxes by the corporation when no such taxes were in fact due. When it does so appear to the auditor it is his duty to and he may be compelled by mandamus to issue his warrant on the treasury in repayment of the sum. In every case where money is received as taxes when not authorized by statute or in violation thereof, the duty immediately devolves on the Auditor, upon proper application by the person paying the same, to issue his warrant on the treasury in repayment of said sum to the payor. It can appear to the Auditor that money has been paid into the treasury as taxes when none are due in at least two ways: (1) When there is no warrant in the statutory law of the State for the levy or collection of such taxes; (2) when the improper and unwarranted payment is made under a void or unenforceable statute or through mistake or inadvertence of the taxpayer, directly into the treasury or to the Auditor. In either of such case it can not fail to appear to the Auditor upon proper investigation that money has been paid into the treasury as taxes when no such taxes were in fact due, and it then becomes his duty to and he *shall* issue his warrant on the treasury for the repayment of the money so improperly paid in behalf of the person who paid the same, provided proper application is made therefor. Manifestly the purpose of the Legislature in passing Section 162, *supra*, was to secure the return of all money paid into the treasury as taxes by taxpayers through mistake, inadvertence, misapprehension of the law, or under void or unen-

forceable statutes, for it expressly declares it to be the duty of the Auditor to issue his warrant in every case where it shall appear to him that the State holds money rightfully and in good conscience belonging to another.

"Following this rule, the Auditor should have promptly issued his warrant on the treasury for \$1,500 in favor of appellee, Security Producing and Refining Company.

"The Auditor can not act arbitrarily in the payment of money, but will be held to strict accountability for all money paid out by him. In doubtful cases he should refuse payment until the question has been determined by the courts. But in every case, such as this, where it is made to appear to the Auditor that money has been paid into the treasury as taxes when no such taxes were in fact due, and demand has been made for its return within the time and in the manner provided by Section 163, Kentucky Statutes, he should promptly draw his warrant on the treasury and return to the payor the money thus received, but the Auditor is not required to go into or review assessments of taxing agencies to determine whether the payment is due or not.

"The cases of *Bank of Commerce of Louisville v. Stone*, 108 Ky. 427, and *Greene, Auditor, v. Taylor*, *supra*; *Louisville City National Bank v. Coulter*, 112 Ky. 584; *County v. Bosworth*, 160 Ky. 312; *Louisville Gas Co. v. Bosworth*, 169 Ky. 824, and all other cases announcing a similar rule, in so far as they conflict with the construction herein given Section 162, Kentucky Statutes, are expressly overruled. We can think of no reason why the State should not be required to live up to the same moral standards demanded of individuals and repay money received by it through mistake or inadvertence. Any other rule is unconscionable and is bad in

morals if not actually dishonest. The State should not merely because it has the power to declare the law, take to itself money rightfully and in good conscience belonging to its citizens and taxpayers without just return. Such a statute would be both arbitrary and unjust and we can not conceive of the great law-making department of this Commonwealth contemplating such a thing by the enactment of Section 162, Kentucky Statutes. Such a purpose, if expressed in a statute would be inimical to all the past declared public policy of the State. The lower court did not err in awarding the writ or mandamus against the Auditor compelling him to draw his warrant on the treasury in favor of the plaintiff and appellee and the judgment is affirmed."

This case was decided by the Kentucky Court of Appeals after the lower Court granted the injunction in the case at bar, and it clears up any uncertainty in the meaning of Section 162, Kentucky Statutes, that may have theretofore existed, and it has been followed in the case of *Craig, Auditor, v. Frankfort Distilling Co.*, decided by the Court of Appeals November 23, 1920.

Now, the appellee's contention in the case at bar is that the statute under which the tax is asserted is unconstitutional and void. The Act attacked requires no action by any assessing board. By its terms the taxes are paid directly to the Auditor. The amount is figured by the taxpayer himself. Therefore, by no stretch of the imagination can it be said that the Auditor, in refunding taxes collected under the law attacked in the bill, would be required

to review the action of any other assessing body. If the taxpayer pays these taxes under protest, then certainly under the authority of the case just quoted he has the right to demand of the Auditor a warrant for the refund of these taxes, and, upon the failure of the Auditor to refund same, the taxpayer may sue the Auditor in an action at law and obtain a mandamus compelling the Auditor to perform his duty and issue his warrant for the amount of taxes wrongfully collected. In such a suit the plaintiff could set up every objection to the validity of the statute which he has set up in the suit at bar, including the Federal questions. That being true, it would seem that the appellee in the case at bar had a full, complete and adequate remedy at law. Certainly his remedy under the Statutes of Kentucky, as interpreted in the case of *Craig, Auditor, v. Security Producing & Refining Company, supra*, is as adequate and complete as were the remedies held by this Court to be adequate in many of the adjudicated cases.

In order to compare the remedy afforded to appellee by the Statutes of Kentucky, under Sections 162 and 163, with the remedies which have in various cases been held to be adequate by this Court, we deem it proper to examine the facts in a few of the cases heretofore passed upon by this Court.

One of the earliest and one of the leading cases on this question is the case of *Dow v. City of Chicago, etc.*, 11 Wall. 108, 20 L. Ed. 65. In that case the aid of equity was invoked to prevent the collec-

tion of a tax levied by the city of Chicago on shares of the capital stock of the Union National Bank of Chicago owned by the complainant. The principal grounds alleged for the relief were that the tax lacked uniformity; that the bank shares attempted to be taxed were owned by non-residents of the State and, therefore, had no taxable situs in Chicago, and that the assessment was made without any notice to the complainant. It was claimed, of course, that the taxing authorities were threatening to sell the shares of stock and work irreparable injury upon the complainant. Objection was made by the defendant to the bill on the ground that there was an adequate remedy at law. The Court, in discussing the adequacy of the remedy at law which the complainant had, used this language:

"If the tax was illegal, the plaintiff protesting against its enforcement might have had his action, after it was paid, against the officer or the city to recover back the money; or he might have prosecuted either for his damage. No irreparable injury would have followed to him from its collection; nor would he have been compelled to resort to a multiplicity of suits to determine his rights. His entire claim might have been embraced in a single action."

The case of *Indiana Manufacturing Company v. Koehne*, 188 U. S. 678, 47 L. Ed. 651, was a suit seeking to enjoin the collection of certain taxes which had been assessed against the complainant, a corporation of Indiana. It was charged that such taxes, or a

greater part of them, were illegal; that the law was in violation of the Federal Constitution, and that the taxing authorities were threatening to levy upon the property of the complainant for the purpose of collecting the tax; that its wrongful collection would lead to a multiplicity of suits, and that irreparable injury would be sustained by the complainant if the law were enforced against it. It also appears from the opinion in this case that the county authorities collected, not only the county revenue, but acted also as the collecting agency for the State's part of the tax. Under the laws of Indiana it seems that Indiana corporations are required to make a report to the assessor, showing the property of the corporation subject to the tax, and the assessor delivers such report to the county auditor, who, in turn, delivers it to a board of review, and this board values and assesses the capital stock and franchises and other property of the company for the purposes of taxation, under the law. From the action of this board the corporation assessed has the right of appeal to the State Tax Commission. Upon this appeal the State Tax Commission has the right to decide as to the assessment, and to make such an assessment, increasing or reducing it as it may decide proper, and the Auditor then certifies the action of this board to the several counties, after which the collection is made by the proper county official.

Another law of the State of Indiana provides that in case any person or corporation conceives that



he should not have paid a tax, or has been erroneously assessed, he may appear before the Board of Commissioners of the county and establish by proper proof that he has paid taxes which were wrongfully assessed against him, and it is thereby made the duty of the board to order the amount so proven to have been wrongfully collected to be refunded to the payer from the county treasury, so far as the same was paid for county taxes, and, as to that portion of same which was paid to the State, it is made the duty of the county board to certify to the Auditor the amount so proven to have been wrongfully collected, and the Auditor is then required to direct the treasurer of the State to refund same. Upon the failure of the authorities to comply with this provision of the law, the taxpayer is then given his remedy by suit.

In this case the defendant moved to dismiss the bill for want of equity, on the ground that the statute furnished to the complainant an adequate remedy at law. The Supreme Court of the United States upheld this contention and held that under this state of facts the complainant had an adequate remedy at law, and sustained the lower Court in refusing to grant the injunction. In this case the Court held that it wasn't even necessary, in order to recover the tax back which had been paid to the State, to sue the State Auditor at all; that, inasmuch as the county was made the collecting agency for the State, the suit could be brought directly against the county, and the county could not be heard to defend upon the

ground that the money had already been paid over to the State, provided notice had theretofore been given to the county that the complainant regarded the tax as illegally collected.

In the case of *Shelton v. Platt*, 139 U. S. 591, 35 L. Ed. 273, there was involved an Act of the Legislature of Tennessee, imposing license taxes on an express company. The claim was made that it was unconstitutional; that it interfered with interstate commerce, and was therefore violative of the Federal Constitution; that its enforcement would subject it to having its property seized by the sheriff and would greatly embarrass the company in the conduct of its interstate business, and the public served by it would be subjected to great inconvenience, and the complainant would suffer irreparable injury by the enforcement of the law. To this bill the defendants demurred on the ground that the complainant had an adequate remedy at law, and the opinion discloses that the law of Tennessee provided that in cases where the taxpayer claimed that he did not owe the taxes, he might pay under protest and then sue to recover back. The complainant claimed that this was not an adequate remedy at law. The Supreme Court, however, held that under the law of Tennessee permitting a recovery back, the complainant had a full and adequate remedy at law, and denied the injunction.

In the case of *Allen v. Pullman Palace Car Company*, 139 U. S. 658, 35 L. Ed. 303, the complainants

were attacking as unconstitutional a license tax which they claimed placed a burden on interstate commerce, and because they claimed it denied the taxpayer the equal protection of the law, and because it was void for repugnancy to the Constitution of the State and the Constitution of the United States. It was also alleged in the bill that in an effort to enforce the taxes against the complainant, the Pullman Palace Car Company, the sheriff of the county had seized and attached a certain sleeping car belonging to the company, and had advertised and threatened to sell same, and was threatening to seize and sell other cars. The allegation was made that this car would not sell at a forced sale for what it was worth, and, in addition thereto, the seizure of this car and the threatened seizure of other cars would hamper the company in its interstate commerce, and, in addition thereto, would destroy its power to be of adequate service to its patrons, and it would thereby be rendered liable for a multiplicity of suits by its patrons.

It would seem that a case of irreparable injury was as strongly made out as could possibly be made under the circumstances. No question was made in the lower court at all of the power of the court to grant the injunction and the lower court granted such an injunction. The question of the power of the court to grant the injunction was raised for the first time in the Supreme Court, and, notwithstanding the fact that it was raised for the first time in the Su-

preme Court, this court held that the pleadings themselves showed that the complainant was not entitled to the relief sought, and reversed the case on the ground that equity should not have granted the injunction under the circumstances, as it appeared that under the law of Tennessee the company had an adequate remedy at law to recover the value of the cars taken, and that had it wished to avoid the sale, an easy and adequate method was furnished by which it could have avoided the sale and still have sustained no loss. All it had to do was to pay the tax under protest, and then sue to recover same back.

In the case of Boise Artesian Hot & Cold Water Company v. Boise City, 213 U. S. 273, 53 L. Ed. 796, the court had under consideration the legality of an ordinance of Boise City, Idaho which imposed a license of three hundred dollars per month on a certain water company which occupied the streets and alleys of the city with its pipes, under a franchise theretofore acquired by it. The bill of complaint attacked the ordinance on the ground that it was discriminatory, and that like licenses had not been exacted of other corporations; that the city was threatening, unless the license was paid, to remove the pipes and other waterworks from the city; that it had brought suits in the State courts to recover the amounts alleged to be already due on account of the license, and would bring other suits, thereby resulting in a multiplicity of suits, and that the ordinance had cast a cloud upon the company's franchise, and

thereby depreciated the value of its property, impaired its credit and confiscated its property; that the ordinance impaired the obligation of its contract theretofore made with the city, and that the enforcement of the ordinance would take the company's property without due process of law and abridge its privileges granted by the Fourteenth Amendment, and that the ordinance violated the Constitution and laws of the State. An objection was interposed to the suit on the ground that the plaintiff had an adequate remedy at law, and the court, by Justice Moody, sustaining this contention, used this language:

"It has been held uniformly that the illegality or unconstitutionality of a State or municipal tax or imposition is not of itself a ground for equitable relief in the courts of the United States. In such a case the aggrieved party is left to his remedy at law, when that remedy is as complete, practicable and efficient as the remedy in equity. And the rule applies as well where the right asserted is by way of defense. *Phoenix Mut. L. Ins. Co. v. Bailey*, 13 Wall. 616, 20 L. Ed. 501, 503.

"In order to give equity jurisdiction, there must be shown, in addition to the illegality or unconstitutionality of the tax or imposition, other circumstances bringing the case under some recognized head of equity jurisdiction, before the remedy of injunction can be awarded. The leading case on the subject is *Dows v. Chicago*, 11 Wall. 108, 20 L. Ed. 65. In that case the plaintiff sought to enjoin the collection of a tax levied upon shares of the capital stock of a national bank on the ground that the levy was

unconstitutional under the State law, and that the property was not within the jurisdiction of the State. This court declined to pass upon the validity of the tax, saying, through Mr. Justice Field (p. 109):

“ ‘The illegality of the tax and the threatened sale of the shares for its payment constitute of themselves alone no ground for such interposition. There must be some special circumstances attending a threatened injury of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction, before the preventive remedy of injunction can be invoked. It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible.’ \* \* \*

In the case of *Singer Sewing Machine Company v. Benedict*, 229 U. S. 478, 57 L. Ed. 1288, the court quoted with approval the rule announced in the last case, *supra*. The *Singer Sewing Machine Company* case, *supra*, was a case where a New Jersey corporation was seeking to enjoin the collection of taxes levied by the city and county of Denver, in the State of Colorado, which taxes the company was claiming were not due, on the ground that it had no notice of the assessment, and the bill also contained allegations that the company had no property within the city and county other than that already returned and paid upon by it, and that the additional assessment and tax levied thereon were illegal, and that to en-

force the collection of such taxes would be violative of designated provisions of the Constitution of the United States. A demurrer was filed to the bill, on the ground that the plaintiff had an adequate remedy at law.

It appears from the opinion that Colorado had a law providing that whenever illegal taxes were collected, the county commissioners should make a refund of same to the taxpayer, and the taxpayer is given a right, upon the failure of the county commissioner to make the refund, to enforce his rights in an action at law. The court upheld the contention of defendant and denied the injunction, holding that the statute which gave the right to the taxpayer to sue to recover the taxes erroneously paid was a full and adequate remedy at law.

In the case of *Arkansas Building & Loan Association v. Madden*, 175 U. S. 269, 44 L. Ed. 159, the building and loan association was contesting in a court of equity the collection of a license tax by the State of Texas. It was claimed that great and irreparable injury would be suffered by the complainant if the tax were permitted to be collected, and that it would be subjected to a multiplicity of suits unless the enforcement of the law was enjoined. The court, however, Chief Justice Fuller writing the opinion, held that inasmuch as there was no law of Texas prohibiting it, the tax could be paid by the complainant under protest to the State officer whose duty it was to collect the tax, and that then suit at law might be

brought to collect this tax back from the officer collecting same, and, inasmuch as this remedy existed, it was full, complete and adequate, and that equity should not issue an injunction to restrain the enforcement of the statute.

It is suggested in the opinion of the court below that the case of *Ex parte Young*, 209 U. S. 122, 52 L. Ed. 714, is authority for granting the injunction in the case at bar. We do not so understand the *Young* case. In that case was involved the validity of what is known as the "Minnesota Rate Laws." That State had passed certain laws prescribing certain rates as maximum rates for passengers and certain rates as maximum rates for commodities. Heavy penalties, including penitentiary sentences, were denounced against those violating the law and charging higher rates than the maximum rates fixed by the statute. An injunction was granted, preventing the Attorney General from prosecuting complainants for a violation of the law, it being claimed that unless such injunction was granted a multiplicity of suits would result, great and irreparable injury would be suffered by the company, and to attempt to test the validity of the law in the courts would subject those testing same to heavy penalties and probable confinement in the penitentiary, if the law should be ultimately held to be good. The Attorney General disregarded this injunction, and was fined and placed in the custody of the marshal, and the case came up on a *habeas corpus* proceeding. In



that case the complainants were confronted with this situation: They must either refuse to comply with the law and thereby take a chance of going to the penitentiary and being fined if the law should be held good or they might comply with the law. In event they complied with the law, they would be absolutely without remedy to recover back the losses they sustained by operating under what was claimed to be destructively low rates, in event it should be ultimately determined in a suit that the law fixing the rates was illegal. So it clearly appeared in that case, not only that there was no adequate remedy at law available to complainants, but that they would suffer irreparable injury, no part of which could be recovered if a temporary injunction was not granted. Such is not the case here. No irreparable injury or damage will be sustained by the appellee in this case by complying with the law and then seeking his remedy under Section 162 of Kentucky Statutes. Appellee is not confronted with the danger of having great penalties inflicted upon it, nor is it confronted with the danger or chance of irreparable loss should it comply with the law and pay the tax. Appellee can avoid all danger of penalties and at the same time protect itself in whatever rights it may have. A very simple means is afforded appellee under Section 162, not only of avoiding any penalties which the law inflicts for its violation, but for getting its liquor promptly removed from Kentucky, which appellee claims it desires to do. All appellee has to

do is to pay the tax to the warehouseman under protest and remove it. When it shall have done this it is subject to no penalty and will have sustained no loss, because it may immediately, under the authority of Section 162 of the Statutes, demand of the Auditor a refund of the money, and upon his refusal may sue the Auditor and collect the same. Nor can there be any just claim that this suggested procedure will lead to a multiplicity of suits.

Appellee in its bill claims that it wants to remove all of its liquor in bond from Kentucky to Massachusetts. By paying the tax due upon this liquor before its removal, appellee can then raise in one suit against the Auditor all the questions which it urges in its bill in this case, and in one suit can recover the amount paid in taxes, should it be finally adjudged in such suit that the law is invalid. Appellee does not have to sue any other taxing agency except the Auditor, because the tax collected is all for State purposes. None of it is for local purposes, and it is all paid directly to the Auditor. No question of having to sue the county or the city or the school district is involved, because they secure no part of the tax.

The cases hereinbefore cited, especially the cases of *Dow v. City of Chicago*, *supra*, and *Allen v. Pullman Palace Car Company*, *supra*, are conclusive against the complainant's plea of irreparable injury, as these cases hold that where the statute provides a method of recovering the tax back from the collecting authority, no claim of irreparable injury will be

sustained. There is no question of a lien upon real estate in this suit, because the complainant in this case is in the unfortunate position of possessing no real estate upon which a lien may be asserted. The bill is construed most strongly against the pleader, and nowhere in the bill does it appear that complainant has any real estate in Kentucky. On the contrary, the bill affirmatively shows that the only property appellee has in Kentucky is the liquor represented by the warehouse receipts. Therefore appellee can not be heard to complain on the ground that the law casts a cloud on real estate; but even did appellee own real estate in Kentucky subject to the lien provided by the statute, that fact would be no ground for equity intervention, because Section 162 of the statute furnishes it ample means of releasing its property from lien. All it has to do is to pay the tax under protest and then any cloud upon the title to the real estate is removed.

In the case of *Union Pacific Railroad Company v. Weld County*, 247 U. S. 282, the court used this language:

"And it also is immaterial that the taxes were made a lien on the company's real property, for the lien would be effectually removed by paying them and suing to recover back."

See also *Allen v. Pullman Palace Car Company*, 139 U. S. 658, and *Arkansas Building & Loan Association v. Madden*, 175 U. S. 269, 44 L. Ed. 159.

In the light of these cases we submit that the complainant has a full, complete and adequate remedy at law and that it should be remitted to this remedy. That it may be more convenient to test the validity of the law in question by an equity proceeding is no justification for such proceeding where an adequate remedy at law exists. As Chief Justice Fuller expressed it in the case of *Arkansas Building & Loan Association v. Madden*, 175 U. S. 269, 44 L. Ed. 159:

"It is quite possible that in cases of this sort the validity of a law may be more conveniently tested by the party denying it by a bill in equity than by an action at law, but considerations of that character, while they may explain, do not justify the resort to that mode of proceeding."

We are especially insistent upon this contention, because we feel that appellee has attacked this law as being confiscatory without having given it any opportunity to operate at all, and, should it be remitted to its remedy at law, there has now intervened sufficient space of time to prove beyond any sort of question that the tax is not confiscatory and has in no way interfered with the removal and sale of whiskey from bonded warehouses in Kentucky.

### **THE PROCEEDING SHOULD HAVE BEEN ABATED.**

Another reason why the temporary injunction should not have been granted is that there was at the time the injunction was granted, and there is now pending in the Franklin County Circuit Court of

Kentucky, a court which has jurisdiction to enforce the statute, a suit to test the validity of the law attacking the bill in this case. In this State suit there was a stay of proceedings, staying the Auditor and Attorney General from proceeding under the law. The record of this proceeding in the State Court is found on pages 42 to 60 of the Transcript of the Record. That the Franklin Circuit Court has jurisdiction to enforce the law in question, we assume counsel for appellee will not deny. We think the same rule which prohibits the Federal Court from using its injunctive process to stay the collection of a State tax, where there is an adequate remedy at law, holds good also in the State courts; but whether it does or does not, the temporary restraining order issued by the Clerk of the Franklin Circuit Court, staying the hands of the appellants herein is binding upon them until the restraining order is set aside. Under the law of Kentucky, it remains in full force and effect until same has been dissolved by a circuit judge upon a hearing.

Section 266 of the Judicial Code, among other things, provides as follows:

"It is further provided that if before the final hearing of such application, a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain an

execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State."

We do not see how it can be contended that this law means other than that whenever a suit to test the validity of a law has been brought in a State court having jurisdiction to enforce the law, and a stay of proceedings has been had in that suit, then the Federal court must stay its hand until a final determination of the case in the State court. The words, "to enforce such statute or order," by every rule of grammatical construction must be held to modify the word "jurisdiction."

Counsel for appellee contend that the suit must have been brought by the State to enforce the law. Such a contention leads to an absurdity, for the reason that if the State brings a suit to enforce the law, by no possible means could a stay be had by the plaintiff in that suit. Certainly the State could not take a stay and at the same time seek to enforce the law. There would be no necessity for the defendant to have a stay, because in his answer he could defend upon all the propositions relied upon to make the law invalid, and, of course, it could not be enforced against him until those questions were finally determined. So it seems that portion of Section 266 above quoted must mean that whenever any one attacks the validity of a law in a State court, and in that attack, by injunction or restraining order, stays the hands of those charged with the enforcement of the law, that

fact of itself automatically, when made known to the Federal court, stays the hand of the Federal court.

**THE TAX IMPOSED BY THE ACT IN QUESTION IS  
AN OCCUPATIONAL OR EXCISE TAX, AND  
JUSTIFIED UNDER THE KENTUCKY  
CONSTITUTION.**

Section 181 of the Constitution of Kentucky, in so far as applicable to this case, is as follows:

“The General Assembly may, by general law only, provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations and professions, or a special or excise tax.”

This provision of the Constitution confers on the Legislature the right to put a license tax on any business for the purpose of raising revenue, or to impose a special or excise tax for that purpose. Counsel for appellee in this case are contending that the tax in question is not an occupational or excise tax, but is a tax upon property; or, if not a tax upon property, that it is an arbitrary attempt on the part of the Legislature to single out and define as a business something that was not contemplated under Section 181 of the Constitution should be treated as a business. The tax is not an *ad valorem* tax, and the Court of Appeals of Kentucky has repeatedly held that such a tax is not a property tax. The law in question in this case is almost an exact duplicate of an act passed

by the special session of the General Assembly in 1917, which imposes a license tax of two cents per gallon upon manufacturers of distilled spirits and the owners of warehouses in which such distilled spirits were stored, same to be paid upon removal from bond or upon transfer under bond from one warehouse to another. The language of the Act of 1917, in so far as applicable, is as follows:

“Every corporation, association, company, co-partnership or individual engaged in the business or occupation of manufacturing distilled spirits known as whiskey or brandy or other species of double stamped spirits in this State, and every owner or proprietor of a bonded warehouse in this State in which such spirits are stored, shall, in addition to the taxes now imposed by law, pay to the Commonwealth of Kentucky a license tax of two cents on every proof gallon of such distilled spirits which is liable for tax to the Federal government, as shown by its official records.”

This act was repealed by the law attacked in this bill. However, the Court of Appeals of Kentucky, in the case of *Greene, Auditor v. Taylor & Sons*, 184 Ky. 742, held that this was a license or occupational tax. The Legislature in 1917 also imposed a tax equal to one per cent of the market value of all crude petroleum produced in Kentucky, which law made the pipe line companies handling such oil the collecting agencies for the State and responsible for the tax. The Court of Appeals of Kentucky, in the case of *Raydure v. Board of Supervisors of Estill County*,



183 Ky. 84, held that this tax was an occupational tax. For many years we have had in Kentucky a law imposing a tax on persons engaged in rectifying whiskey, the tax being one and one-fourth cents upon every wine gallon of whiskey compounded and rectified by the persons embraced within the provisions of the act. The Supreme Court of the United States in the case of *Brown-Forman Company v. Kentucky*, 217 U. S. 551, 54 L. Ed. 883, held that this was an occupational tax. So that it would seem that there can be no question that the tax complained of in the bill in this case, is an occupational or an excise tax.

We think counsel for appellee are in error in contending that the Legislature has singled out as an occupation in this case the single business of owning and storing intoxicating spirits in bonded warehouses and removing same therefrom. While the law may be inaptly drawn and expressed, a reading of all of its provisions clearly indicates that it was the purpose of the Legislature to tax one continuous business, beginning with the distiller and ending with the removal of the distilled spirits from the bonded warehouse in which the distiller stored such spirits. We do not see how it can be successfully contended that the distiller under this act must pay a tax of fifty cents per gallon for manufacturing, and in addition to this tax the person who stores same in a bonded warehouse must pay another tax, and the person who removes same from the bonded warehouse must pay a third tax. The evident purpose of the Legislature

was that this entire business of distilling, owning and storing and removing from bonded warehouses should bear only the one tax as an occupational tax. The fact that a portion of the acts constituting the business had already been performed at the date of the passage of the law should in no wise affect the validity of the act. It is true as to most of the liquor reached by this tax that the act of distilling same had been performed and completed prior to the passage of the act, but it was an act subject to an occupational tax at the time the distilling was done, and the mere fact that the law may appear in a sense retroactive as to that portion of the business in no wise invalidates same, the inhibition against *ex post facto* laws applying only to criminal statutes. There is no provision in the Constitution of Kentucky nor of the United States which forbids the enactment of retrospective legislation, so long as such legislation is not an *ex post facto* statute within the meaning of the Constitution, and so long as same does not impair the obligation of a contract or interfere with vested rights.

Locke v. City of New Orleans, 4 Wall. 172, 18 L. Ed. 334.

League v. Texas, 184 U. S. 156, 46 L. Ed. 478.

Kentucky Union Co. v. Kentucky, 219 U. S. 140, 55 L. Ed. 137.

Cooley on Taxation, 3rd Edition, Vol. 1, 492.

Billings v. United States, 232 U. S. 261, 58 L. Ed. 596.

It will be observed that Section 2 of the act makes the warehouseman in which the liquors are stored the collecting agency of the State, and he is required to make the reports, showing the amount of tax due on each reporting day. No tax is required of the distiller at the time he distills his liquor and places it in a bonded warehouse. No separate tax is required of the owner and storer of liquor as long as it remains in the bonded warehouse. It is only when the liquor is removed from bond or transferred under bond out of the State that the tax becomes due, and an examination of Section 3 of the act discloses that only one tax for the entire business is to be collected, and this is measured at the rate of fifty cents for each proof gallon of liquor which is removed from bond or transferred under bond out of the State. The evident purpose of the act was to impose a tax on the one business of manufacturing distilled spirits and the preparation of same for market, and the intent of the Legislature was to make each and all of the agencies engaged in the manufacture and preparation and the handling of this liquor responsible for this one tax, the apportionment of the tax between these various agencies being left to the agencies themselves.

As a further inducement to the belief that the Legislature was attempting to impose an occupational tax on the one business—manufacturing distilled spirits and the preparation of same for commerce—we invite the court's attention to Section 8 of the act in question, which refers to persons "en-

gaged in the business covered and licensed by this act." It would seem from this language in Section 8 that the Legislature regarded the business attempted to be taxed as one business, and not as a series of occupations. Furthermore, the construction placed on the Act of 1917, which the Act in question displaces, is persuasive of our contention that the purpose was to tax only the one business. While the Act of 1917 provided in express terms that every corporation, association, company, etc., engaged in the business or occupation of manufacturing distilled spirits, *and* every owner or proprietor of a bonded warehouse in this State in which such spirits are stored, should pay a license tax of two cents on every proof gallon of such distilled spirits, the uniform construction placed upon this act by the authorities charged with its enforcement was that it imposed only one tax on the one business of distilling and storing liquors in a bonded warehouse. During all the period this law was in effect, no claim was made by the authorities charged with its enforcement that the Act of 1917 imposed a tax on the business of distilling and a separate tax on the warehouseman.

Even should the Court be of opinion, however, that our construction of this act is erroneous, and that it is not a tax on the one occupation of distilling, owning and storing in bonded warehouses, but that the Legislature was undertaking to tax the business of owning and storing in bonded warehouses as a separate business, we think the law is justified under

Section 181 of the State Constitution. Persons who store liquor in bonded warehouses do so for a certain definite purpose. One is to permit it to age, so that it may be bottled in bond and then sold to the trade. To do this, under government regulations, it must remain in storage and age for four years. This is undoubtedly doing something which is a necessary part of the business of selling liquor. Another purpose in storing liquor in a bonded warehouse is that which animates all persons who store in a public warehouse, viz.: to have some person in charge and in keeping of the goods and responsible therefor. Another reason for the storage is to avoid payment of government taxes until a sale has been secured for the product stored. It would seem that a person engaged in the liquor business to any extent would undoubtedly have to engage in these particular acts in order to so engage in business.

The appellee's bill in this case shows that it bought the liquor in question in this case at the date of its being placed in the bonded warehouse four years ago; that it has been left in the bonded warehouse for the purpose of aging. Appellee alleges in its bill that it has now become of sufficient age to make it merchantable whiskey. So that it would seem, under the protection of the Kentucky law, it has been storing its liquor in Kentucky for the definite purpose of preparing it for market and now has it stored in Kentucky ready for the market. Appellee now seeks, notwithstanding the fact that it has had the benefit of

the Kentucky law up to this date in preparing its product for the market, to withdraw it without paying tribute in any way to Kentucky for the privilege of having engaged in Kentucky in the business of preparation of its product for market.

The Legislature of Kentucky, under the Constitution of the State, has the undoubted right to single out a business and impose an occupational tax on such business, and unless the definition and selection of the business made by the Legislature is so arbitrary and capricious as to be unreasonable, the courts are not justified in declaring the act of the Legislature illegal.

In the case of *Female Academy v. Sutherland*, 116 Ill. Reports (Freeman), 375, the court was called upon to define the meaning of the words "doing business in this State." The court used this language:

"Receiving lands in this State by devise, and the assertion in the State of ownership of them we regard a sufficient doing business in this State to bring appellant within the purview of this language of the section."

In the case of *Pennsylvania v. Bauerle*, 143 Ill. Reports, 461, the court, in construing the same statute referred to in the case above, used this language:

"So here, receiving the land adjoining Chicago by devise, with power to sell, and dispose of same, and the power to lease it and to collect the rents and profits therefrom, and the assertion in this State of the ownership of said land and assuming to sell and convey it, and bringing

suits in the courts of this State in respect to said land and such alleged ownership, and for the enforcement of contracts in regard to same, must be held to be doing business in this State within the purview of this section."

While it is true that the two opinions just referred to were not construing a statute imposing a tax on doing business, still they illustrate how far the courts have gone in holding that certain acts constituted doing business within the State.

#### **DO THE PENALTIES FOR VIOLATION OF THE ACT IN QUESTION MAKE IT INVALID?**

The appellee claims, and the lower court found, that the penalties fixed by the act in question for its violation are so oppressive as to render the entire law invalid. The lower court justified its position in this respect upon the idea that the laws of Kentucky furnish no adequate method of testing the statute without incurring the risk of penalties, and that the penalties were so large as to serve as a practical prohibition against any one resisting the law and taking the risk of ultimately having to pay the penalties, in event the law should be held good. We think this position of the lower court, however, is without any force whatever, when the act is considered in connection with Section 162 of the statutes hereinbefore referred to. It has been heretofore shown in this brief how one may test the law in question without incurring any risk, either of penalties or of loss. It is

the universal rule that where a means is furnished by which a law can be safely tested without the person testing same incurring the penalties, in event he loses in the test, substantial penalties may be imposed. We think it safe to say that an act otherwise valid will not be held invalid on account of penalties alone, unless there exists the further fact that the person subject to the provisions of the law is afforded no means of testing same without incurring the risk of having to pay the penalties.

St. Louis, I. M. & S. Railway Co. v. Williams, *et al.*, 40 Supreme Court Rep. 71.

Waddy v. Southern Railway Co., 235 U. S. 67, 59 L. Ed. 405.

Gulf, Colorado & Santa Fe Railway Co. v. State of Texas, 246 U. S. 58, 62 L. Ed. 574.

Assuming that Section 162 of the statutes of Kentucky, hereinbefore referred to, affords an adequate and safe means of testing the act in question without incurring the risk of the penalties, it can not be said that the penalties for a violation of the act are excessive and unreasonable. The court must look to the object intended to be accomplished by the imposition of the penalties. It is evident that the act intended to make the liquor itself part security for the collection of the tax imposed by the act, and unless the penalties were heavy, the temptation would be very strong for the owners of large quantities of liquor stored in bonded warehouses in Kentucky to remove same from such warehouses between two reporting dates, without the payment of the tax, and all that



the State would have left to secure it in the tax would be a claim against the warehouseman, secured by a lien against such property as he owned and used in connection with the warehouse. Certainly, in view of this situation, the State is justified in imposing such penalties for failure to report and promptly pay the tax as would minimize the danger of having the whiskey removed without satisfying the tax for which it stands in lien.

Furthermore, we think that the section of the statute which imposes the penalties may be considered as separable, and may be adjudged to be invalid without affecting the rest of the law. While undoubtedly the Legislature considered the imposition of the penalties as an important part of the statute, as a means of collecting the tax, we do not think it can with reason be held that the Legislature regarded the penalties as so vital as that the law would not have been passed without the penalty provision.

**IS THE APPELLEE DENIED THE EQUAL PROTECTION OF THE LAW GUARANTEED BY THE  
FOURTEENTH AMENDMENT?**

The appellee claims in its bill that the State has denied to it equal protection of the law guaranteed by the Fourteenth Amendment, basing this on the idea that it places the owner of liquor stored in Kentucky at a disadvantage in competition with the owners, storers and manufacturers of liquor outside of Kentucky.

This very question was raised in the case of *Brown-Forman, Company v. Kentucky*, 217 U. S. 531, 54 L. Ed. 883. In that case there was involved the legality of the Act of 1906, which imposed a license tax of one and one-fourth cents per gallon upon every person engaged in the occupation of compounding, rectifying, adulterating or blending distilled spirits. One of the grounds of attack was that a like tax was not imposed upon the compounders and rectifiers conducting the business outside of Kentucky, and that the product produced by such non-resident compounders and rectifiers came in direct competition with the product of the Kentucky compounders and rectifiers, to the disadvantage of and unfair discrimination against the Kentucky rectifiers, inasmuch as the Kentucky rectifiers and blenders were paying a burden not borne by the men outside of Kentucky engaged in the same business. The plea was made that by reason of this situation the Kentucky blenders, compounders and rectifiers were denied the equal protection of the law guaranteed by the Fourteenth Amendment of the Constitution. The court discussed the case at length and reached the conclusion that, inasmuch as the business being taxed was a business conducted exclusively in Kentucky, the court could not concern itself as to whether or not it did work a discrimination in favor of persons engaged in the business outside of Kentucky; that, of course, the State could not control the business outside of its borders, and to hold that

it could not impose a burden upon the business within its borders would be to effectively deny the power of raising revenue by this method of taxation. The Fourteenth Amendment to the Federal Constitution was never intended to be distorted by any such construction as is attempted to be placed upon same in this case. The Federal Amendment was never intended to guarantee that Kentucky should give the same privileges and the same rights to its citizens, by virtue of its statutes, as the State of Illinois or some other State gives to its citizens by its statutes. If that were the construction placed upon the Fourteenth Amendment, it would necessarily follow that every State in the Union would be compelled to make its laws conform in all respects, where the rights of citizens are concerned, to the laws of other States. Whenever the law of a State applies alike to all engaged in business within its borders, then this Federal Amendment has been fully met and complied with.

### **IS THE TAX CONFISCATORY?**

This court has repeatedly held that an act of Congress levying an excise tax will not be held invalid merely because it operates practically to prohibit the business taxed.

*McCray v. United States*, 195 U. S. 27, 49 L. Ed. 61.  
*In re License Tax Cases*, 5 Wall. 463, 18 L. Ed. 497.

Pacific Insurance Co. v. Soule, 7 Wall. 433, 19 L. Ed. 95.

Austin v. Boston, 7 Wall. 694, 19 L. Ed. 224.

However, this tax is levied under the authority of Section 181 of the Kentucky Constitution, and the Court of Appeals of Kentucky in construing that section has held that an occupational or excise tax levied under this section of the State's Constitution must not be so excessive as to be prohibitive of the business taxed. It, therefore, becomes important to determine whether or not the tax imposed by the law in question is prohibitive of the occupation taxed.

The appellee in this case seeks to make capital out of the inapt use of the word "annual," occurring in the title to the Act and in Section 1 of the Act, and insists that this language imposes a tax of fifty cents per proof gallon for each proof gallon of spirits stored in a bonded warehouse for each year same may remain in such warehouse. Such is not the construction placed on the act by the authorities charged with its enforcement, and such is not the meaning of the Act. Section 3 of the Act clearly shows the real basis upon which the tax is to be collected. It simply imposes a license tax, to be measured by the number of proof gallons removed by any person affected by same from a bonded warehouse, or transferred under bond to a bonded warehouse out of Kentucky. The number of gallons is merely the criterion by which to calculate the amount of license tax due by any particular individual affected by the law. The tax

is not cumulative, and no person is required under the terms of the law to pay a license tax of fifty cents per proof gallon for each year a gallon of whiskey may remain in a bonded warehouse, but one payment of fifty cents per proof gallon, due and payable upon its removal from a bonded warehouse, or upon its transfer under bond out of the State, fully satisfies the provisions of the law.

There is no merit in the contention of counsel for appellee that this tax amounts to expropriation, because the law does not seek nor does it in actual operation appropriate to the State any part of the property which is used as a basis upon which to figure the tax. This is not one of those cases where the State is seeking to appropriate as a license a portion of the income of the person engaged in the business taxed. So those cases in which the courts have undertaken to limit the amount of income of the business which a State may legally claim as a tax have no application to this case whatever. We think the proof in this case conclusively shows that this tax is being passed on by those subject to it to the consumer, and that the consumer in the long run is the man who pays all this tax.

The affidavit of Thomas S. Jones, filed by the appellee in this case, and which is found on pages 24 and 25 of the transcript, shows that the said Jones has been a distiller for forty years, and for the past twenty years has been actively engaged in the whiskey brokerage business; that he is familiar with the

current market price of Kentucky Bourbon whiskey and with the markets therefor. From his affidavit we quote the following language:

“\* \* \* That the fair and reasonable sale price of distilled spirits known as whiskey, and of the Bourbon character thereof, *whether such whiskies be stored in Kentucky or in other States of the Union than Kentucky, is in bond approximately one dollar to one dollar and a quarter per proof gallon.*”

This statement in the affidavit means and can mean but one thing—that if the owner of warehouse receipts representing whiskey stored in bonded warehouses, whether in Kentucky or out of Kentucky, can secure a dollar to a dollar and a quarter per gallon therefor, he is securing a reasonable price, which necessarily means that he is making a reasonable profit.

Now, in connection with Jones' affidavit filed by appellee, we ask the court to consider the affidavit of Samuel Freedman filed by appellee, and found on pages 22, 23 and 24 of the record. We quote from his affidavit as follows:

“I am familiar with the prices now prevailing upon distilled spirits known as Bourbon whiskey in the various markets throughout the United States, and from my own knowledge and from the best information obtainable such distilled spirits known as Bourbon whiskey, if stored in a State other than Kentucky, can be sold at a price of approximately a dollar fifty cents (\$1.50) to a dollar seventy-five cents (\$1.75) per gallon in bond.

"The average price obtainable for such spirits known as Bourbon whiskey, if stored in the State of Kentucky is approximately one dollar (\$1.00) per gallon to dollar twenty-five cents (\$1.25) per gallon."

We also in this connection invite the court's attention to the testimony of Alfred B. Flarsheim, another distiller, on page 106 of the record. This question was asked him on cross-examination by the attorney for the appellee:

"Q. What is the prevailing market price in the United States of Bourbon whiskey stored in bond when the sale is evidenced by the transfer of negotiable warehouse receipts?"

A. For goods made in Kentucky around one dollar per gallon, some lower and some a little higher."

And again, on page 107 of the Transcript:

"Q. I did not catch your answer with reference to the prevailing market price of warehouse receipts evidencing the ownership of whiskey stored in a warehouse outside of Kentucky. State what that market price is?"

A. From \$1.50 to \$2.00."

Now, then, if Jones in his affidavit is right when he says that a fair and reasonable price for whiskey stored in bond is a dollar to a dollar and twenty-five cents per gallon, whether stored in Kentucky or out of Kentucky, it necessarily follows, if Freedman's and Flarsheim's testimony is true, that the owners of liquor stored outside of Kentucky, when they sell their liquor in bond for a dollar and fifty cents to a

dollar and seventy-five cents per gallon, are making more than a reasonable profit. Freedman's affidavit shows that Kentucky-stored liquor is now bringing a dollar to a dollar and twenty-five cents per gallon. Therefore, reading the two affidavits of Jones and Freedman together, the owner of Kentucky stored liquor is making a profit at the prices which Freedman says are now obtainable, in spite of the imposition of the fifty-cent license tax complained of, and at the prices which Freedman says Kentucky liquors are now bringing the purchaser may buy liquor stored in Kentucky and pay, in addition to the purchase price, a license tax of fifty cents per gallon, and then the Kentucky stored liquor is costing the consumer no more than Freedman says liquor stored outside of Kentucky is now bringing, namely, one dollar and fifty cents to one dollar and seventy-five cents per gallon.

There can be but one inference drawn from this, and that is, not that this fifty-cent tax has depressed the price of Kentucky liquors, but that it has served as an excuse and furnished the opportunity for owners of liquor stored outside of Kentucky to raise their price fifty cents per gallon. If the competition exists in the sale of liquor that the interested parties in this case would have the court believe, the court knows that this fifty cents would not have been added on to the price of liquor stored outside of Kentucky, but the price would have been left at from one dollar to one dollar and twenty-five cents per gallon, which



Jones says is a fair and reasonable price. At such a price, had there been any competition in the liquor business as it now exists, of course, Kentucky liquor, having to carry the extra burden of fifty cents, would have been forced out of the market until outside stocks were exhausted. But such is not the case. In view of the fact that a purchaser of liquor can still buy Kentucky liquor at the old price of one dollar to one dollar and twenty-five cents per gallon and pay the State tax of fifty cents in addition thereto, and still have to pay no more for his liquor than he would pay for it had he bought it from a bonded warehouse located outside of Kentucky, we must reach the conclusion, not only that there is no competition in the sale of liquor, but that Kentucky-stored liquor and the conditions obtaining as to it fixes the prevailing market price of Bourbon whiskey throughout the United States. The net result of the complaint in this case, if the affidavits of Jones and Freedman and the testimony of Flarsheim are to be accepted as true, is that the owners of Kentucky-stored liquor are dissatisfied because they are not able to make the same profit as the owners of liquor stored outside of Kentucky are making, and with this complaint the courts are not concerned.

As still further proof that Jones is correct when he claims that one dollar to one dollar and twenty-five cents per proof gallon is a fair and reasonable price for bonded liquor, regardless of where it is stored, we invite the court's attention to the affidavit

of Joseph Debar filed by the appellee in this case, and found on pages 19, 20 and 21 of the Transcript of Record. On page 21 of the Record, Debar in his affidavit shows that even with the present high cost of materials and labor, whiskey can now be manufactured at a cost of from forty to fifty cents per gallon, and at the end of four years' storage may be sold at a price not exceeding seventy cents per gallon, which price would, of course, net the manufacturer a profit. This conclusively shows that Jones is entirely correct when he says that the reasonable price of such liquor runs from one dollar to one dollar and twenty-five cents per gallon. The testimony of Jones is still further supported by the affidavit of James Thompson, filed by the appellee in this case, and which is found on pages 30 and 31 of the record. In this affidavit Thompson states:

“\* \* \*,that at the present time the cost of production of distilled spirits known as whiskey, notwithstanding the abnormal prices of raw material, grain, cooperage and labor, is about forty-five cents per gallon; and the carrying charges upon such whiskey until it is four years of age, the period in which distillers are permitted to bottle in bond, amount to approximately twenty-five cents per gallon.”

Of course, if Thompson and Debar are correct in their estimate of the present cost of manufacturing liquor, its cost was considerably less at the time most of the liquor now in bond was manufactured. But all of this testimony produced by the appellee in this

case, and all from the mouth of interested witnesses—distillers and the owners of liquor—conclusively shows that the price of one dollar to one dollar and twenty-five cents per gallon for liquor stored in bond is a reasonable price, at which a profit may be made. That the Kentucky distillers and the owners of Kentucky-stored liquor are now able to get from one dollar to one dollar and twenty-five cents per gallon for Kentucky-stored whiskey, when sold through the medium of warehouse receipts, there can be no doubt from any of the proof in this case. Freedman swears it; Alfred B. Flarsheim, a distiller, swears it (see page 106 of the Record), and this same Flarsheim, on page 104 of the Record, swears that he is getting for his liquor stored in Kentucky around a dollar and forty cents per gallon. William J. Gorman, another distiller (page 88 of the record) swears that he is getting around a dollar to a dollar and ten cents per gallon. It will be borne in mind that all these prices referred to in the sale of warehouse receipts require the purchaser to pay, in addition thereto, all taxes, including the fifty-cent tax complained of in the bill.

In view of this proof, how utterly foolish is the claim of interested liquor dealers that they have been compelled to reduce the price of their product since the imposition of the fifty-cent tax. To illustrate the deceit attempted to be practiced in this case by the distillers, we invite the court's attention to the statement of William J. Gorman (page 86 of the Record),

in which he states that prior to the imposition of the fifty-cent tax, his concern was selling bottled-in-bond goods, all carriage charges and taxes paid, at thirty dollars a case, and that since the imposition of the fifty-cent tax he has been compelled to reduce that price to twenty-five dollars a case and then to twenty-two dollars a case. We are unable to understand why any reduction should have been made in the prices of the liquor to the consumer, if, as Gorman states, he was selling it free of any tax charge. The net result of Gorman's statement is that because he has been compelled to pay fifty cents per gallon more than he formerly paid, the consumer who buys the liquor taxpaid when the goods are sold by the case is now able to purchase the liquor at five dollars a case less than formerly.

We think this proof conclusively shows that the claim of appellee that this tax is destructive and prohibitive of the business is absolutely untrue. It appears from the testimony of Alfred B. Flarsheim (page 106 of the Transcript of Record) that his concern is now selling the product of its distillery at an average of about nineteen dollars and forty cents per case, bottled in bond. This price includes all carriage and storage charges, government taxes and State taxes, including the fifty-cent license tax imposed by the act in question. Flarsheim testifies that at this price his concern is making a profit and a little figuring by the court, based upon the testimony in this case, shows that he is undoubtedly making a big

profit. The government tax on this whiskey is two dollars and twenty cents; the State license tax is fifty cents. According to the testimony of William J. Gorman (page 92 of the Record), the State *ad valorem* tax, including the local *ad valorem* tax, storage charges, insurance charges and interest charges on the original investment, would amount to about six cents per gallon per year. In order to be on the side of absolute safety, however, we will figure these charges at the rate of ten cents per gallon per year, or for five years, assuming that to be the average age at which whiskey is removed from bond, this would amount to fifty cents, making a total of three dollars and twenty cents to cover government tax, State license tax, insurance charges, interest charges, storage charges and State and local *ad valorem* taxes.

It is further shown by William J. Gorman (page 95 of the Record) that at the present cost of labor and material, it costs about four dollars to bottle in pints a case of whiskey, exclusive of the warehouse charges, taxes, etc. As there are three gallons of whiskey in a case, this charge would amount to a dollar and thirty-three cents per gallon, making a total cost of all the items enumerated of four dollars and fifty-three cents, without accounting for loss by evaporation. On page 91 of the Record, Gorman testifies that in seven years a barrel of whiskey would lose by evaporation about thirteen and a half gallons. This is equivalent, in a barrel of fifty gallons, to an evaporation of about two gallons per year. In

other words, there is an average evaporation of one twenty-fifth of the contents per year. In five years, the period we are figuring on, it would result in an evaporation and loss of one-fifth of the total contents. If the testimony hereinbefore referred to is true, that the original cost of the liquor was fifty cents per gallon, or even putting it as high as seventy-five cents per gallon, this loss on a gallon in five years would amount to only fifteen cents, which, when added to the four dollars and fifty-three cents, would make a total cost, including every conceivable item, of four dollars and sixty-eight cents per gallon. At the selling price of nineteen dollars and forty cents, the lowest price quoted, the owner of the liquor would realize a gross price of six dollars and forty-six cents per gallon, and after deducting the four dollars and sixty-eight cents, the total cost, there would be a net price realized by the dealer of one dollar and eighty-eight cents per gallon, after taking into account every item of cost, other than the original cost of the liquor itself, which, figured at fifty cents, would leave a clean net profit of one dollar and thirty-eight cents per gallon.

There is nothing to prevent any person owning warehouse receipts, or any person owning liquor stored in a bonded warehouse, from having his liquor bottled in bond and sold in the manner indicated, and if he is not satisfied with the reasonable profit received in selling his warehouse receipts at from one dollar to one dollar and twenty-five cents per gallon,

which Jones says is a reasonable price, he may resort to the last method indicated above and make a profit that ought to satisfy the wildest dreams of avarice. Nor is he even confined to the price fixed by Jones for the warehouse receipts, nor to the price of case goods as fixed by Flarsheim.

Of course, the main market for whiskey under present conditions is found in drug stores handling same for medicinal purposes. The affidavits in this case show very clearly what druggists are paying to wholesale liquor dealers and distillers for the whiskey which they dispense under present Federal and State regulations. These affidavits, found on pages 34, 35, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81 and 82 of the Transcript of Record as well as the exhibits in the form of price lists filed with same show conclusively that bottled-in-bond case goods were selling at the time the record was made up at from twenty-one dollars per case, containing three gallons, to as high as thirty dollars per case, and the court will observe that most of these quotations are on Kentucky whiskey. Of course, these prices include all taxes, storage, interest and insurance charges. These same affidavits disclose that whiskey in bulk was selling during the same period at from five dollars to six dollars and fifty cents per gallon, which price likewise included all taxes, storage, insurance and interest charges. These affidavits likewise show that warehouse receipts were quoted by jobbers and wholesalers to the drug trade at from one dollar and fifty

cents to one dollar and sixty-five cents per gallon. (Page 35, Transcript of Record.)

So that, in addition to his ability to secure the prevailing market price of warehouse receipts representing liquor stored in Kentucky, namely, a dollar to a dollar and a quarter per gallon, and his ability to bottle same in bond and sell it at a price around nineteen dollars per case, it will be observed that the owner of liquor stored in bonded warehouses in Kentucky has an opportunity to bottle same in bond and sell it direct to the drug trade at prices ranging from twenty-one to thirty dollars per case, making a still greater profit than the price referred to by Flarsheim. Or, he may sell it in bulk to consumers authorized to use it at the prevailing prices quoted to druggists of from five dollars to six dollars and fifty cents per gallon and make a nice profit. The holder of warehouse receipts has no right to claim any better position for himself than the original owner and vendor of these receipts—the distiller. But looking at the matter either from the standpoint of the distiller or the person who owns the warehouse receipts, this record conclusively shows that the tax imposed by this law has not prohibited the business nor taken the profit out of the business. It has simply permitted outside owners to get a bigger profit than the owners of Kentucky stored liquor.

As a still further evidence that this tax has not prevented the movement of Kentucky stored whiskey, we invite the Court's attention to the affidavit of El-



wood Hamilton, Collector of Internal Revenue of Kentucky, which is found on page 35 of the record. The records of his office, as shown by his affidavit, show that more whiskey has been taxpaid and moved out of Kentucky bonded warehouses to *bona fide* purchasers since this law became effective than was moved for like periods in the months immediately preceding the effective date of the law. This affidavit shows that from the 16th day of January, 1920, up to the 1st day of February, only 15,464.3 gallons of whiskey were removed and taxpaid from bonded warehouses in Kentucky. January 16th is fixed as a starting point because immediately prior to the 16th day of January a great quantity of liquor was shipped from Kentucky for export before the exportation for beverage purposes was prohibited, and that which has moved since the 16th day of January has been moved only for the purposes for which whiskey may now be moved, or, at least, that is the presumption. This affidavit shows that in February, 1920, 121,226.6 gallons of whiskey were tax paid and removed from bonded warehouses in Kentucky, while from the 12th day of March, 1920, up to and including the 31st day of March, 1920, 165,084.3 gallons of whiskey were taxpaid and removed from bonded warehouses in Kentucky. This was the first period during which the fifty cent tax law operated, the law becoming effective March 12, 1920. These figures show that in the nineteen days of March, 40,000 gallons or more of whiskey were moved under the fifty-cent tax law than were moved in the entire period

of February before the law became operative, and in the month of April, 1920, notwithstanding the fact that the record shows that from the 13th to the 23rd day of April, 1920, no shipments were received by the railroads, on account of the embargo and strike troubles (page 69 Record) 254,159.3 gallons of whiskey were tax-paid and removed from bonded warehouses in Kentucky—more than double the amount that was removed for the entire month of February immediately preceding the effective date of the law.

In addition to these facts, it will be observed by the opinion of the lower court in this case that other distillers and owners of liquor were permitted and invited by the lower court to intervene in the case at bar, in event they desired to attack the legality of the fifty-cent tax law, and, while this record does not disclose it, practically all of the distillers in Kentucky have intervened, either in this suit or in the companion suit, 439, now pending in this court. Each of these litigants secured temporary injunctions, and the order granting them injunctions required that on each reporting date fixed by the statute, namely, the first day of each month, while said injunctions were in force, the distillers, enjoying the protection of these injunctions, should file reports with the clerk of the court and with the Auditor of Public Accounts, showing the amount of whiskey which had been disposed of up to the reporting date and execute bond to secure the ultimate payment of same, should the ultimate payment be adjudged. Of course, we know that on all the whiskey which has

been moved and sold to the trade under the protection of these injunctions the fifty-cent tax was collected from the consumer, and, while the record does not show this fact, as it was brought up before these figures were available, it is a matter of record in the lower court, which counsel for appellee will not dispute, that there has been moved from bonded warehouses in Kentucky since March 12, 1920, the effective date of the law, and up to the 1st day of November, 1920, the enormous sum of approximately 4,000,000 gallons.

In the face of this record of sales and removals which have been made by the appellee herein and others seeking to invalidate this law, we do not see how with good grace they can ask this court to say that the law has proven prohibitive of the business. The court can not conjecture on this proposition of whether or not the tax is confiscatory and prohibitive of the business. The burden is upon the appellee to make out its case by clear and unmistakable proof. It is only when by the clearest proof it is established that the law is confiscatory that the court should interfere with same. Even if the law should prohibit some particular person from engaging in the business, that of itself would not render the law invalid. It must be prohibitive of the business as a whole. The court can not single out isolated cases where it works an undue hardship and thereby say the tax is prohibitive. This principle is well settled by the courts of Kentucky in construing Section 181 of the Constitution.

In the case of *City v. Sagalowski & Son*, 136 Ky. 324, the Court of Appeals used this language:

“Instances might be cited, and could be easily imagined, where any license tax of enough moment to meet the requirements of its enactment bear so heavily on certain individuals as to be severely onerous, perhaps oppressive, yet no tax or other rule is to be tested by its exceptions alone. The test is whether the tax bears so heavily on the class, not isolated and exceptional individuals, as to prohibit the occupation and be confiscatory.”

This court, if it should be of opinion that we are in error in our contention that the appellee has an adequate remedy at law, and if we are in error that the cause should have been abated, should not hold this law invalid on the ground of it being confiscatory, until it has been given a fair test. The proof in this case, when carefully examined, not only fails to show the confiscatory nature of this tax, but affirmatively shows that it is not confiscatory, and the record of removals and sales made since the injunction in this case was granted belies every claim of appellee that whiskey men in Kentucky can not do business when burdened with this tax. The truth of the matter is that this record shows, since the passage and effective date of this law, that those persons having liquor stored outside of Kentucky have taken advantage of the situation and raised their price fifty cents to seventy-five cents per gallon, and when this case is sifted to its bottom it demonstrates the propo-

sition that the appellee, having enjoyed the protection of Kentucky law for its product for four years, now seeks to withdraw it from Kentucky and take it into Massachusetts and there sell same at an increased price and with an added profit, which has been brought about solely by the operation of the law of which he complains.

In conclusion, we submit:

1st. That there is no equity in the bill; that the appellee has a plain, simple, speedy and adequate remedy at law, and, under the well-established principles, time and again announced by this court it should not be allowed to stay and embarrass the collecting agencies of the State under these conditions.

2nd. That the pendency of the proceedings in the State court, accompanied by a stay of proceedings, requires that the Federal court stay its hand until the final determination of the issues in the State court.

3rd. If the court is not impressed with either of these contentions, then we submit that the claim of appellee that this law is prohibitive of its business falls to the ground, in the light of the proof in the case, and that upon the whole record there exists no real ground or fact upon which it may be claimed that any right secured to the appellee by the Federal Constitution has been denied it.

All of which is respectfully submitted. \*

CHAS. I. DAWSON,  
*Attorney General.*

W. T. FOWLER,  
*Assistant Attorney General.*

## APPENDIX.

*AN ACT imposing an annual license tax upon every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits known as whisky or brandy or other species of double stamp spirits in this State, and upon every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in the State, and in removing same therefrom for the purpose of sale, or for any other purpose; providing for monthly reports by distilleries and bonded warehousemen, for the purpose of ascertaining the amount of tax due; providing for monthly payments of the amount of license tax due; fixing a penalty for failure to make such monthly report and settlement; providing for the manner of distribution of the tax so collected; repealing all other license, franchise and excise taxes on the businesses covered by this Act, and declaring an emergency to exist.*

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

1. Every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits, known as whisky or brandy or other species of double stamp spirits, in this State; and every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in this State, and in removing same therefrom for the purpose of sale, or for any other purpose, shall pay an annual license tax to the Commonwealth of Kentucky of fifty cents on every proof gallon of said distilled spirits so manufactured or stored in a bonded

warehouse, or withdrawn from a bonded warehouse, or transferred therefrom under bond out of the Commonwealth of Kentucky.

2. Every corporation, association, partnership and individual owning, controlling or operating a bonded warehouse in this State, wherein distilled spirits known as whisky or brandy or other species of double stamp spirits are stored, shall, on or before the first day of June, 1920, on blanks furnished by the Auditor of Public Accounts, report to the Auditor of Public Accounts the total amount of such spirits stored in a bonded warehouse owned, controlled or operated by such corporation, association, partnership or individual; and shall make monthly reports to the Auditor of Public Accounts thereafter, which reports must be signed and sworn to by such person, or, in case of a corporation, association or partnership, by some officer or person authorized to make such oath. The first report provided for herein shall show the number of proof gallons of such spirits withdrawn from said warehouse from the date this Act becomes effective to the date of making such report; and each monthly report thereafter shall show the number of proof gallons placed in said bonded warehouse since the date of making the last preceding report, the number of proof gallons withdrawn or transferred since the date of making the last preceding monthly report, and the aggregate number of gallons on hand at the date such report is made. In all cases where such spirits are transferred under bond from one bonded warehouse in this Commonwealth to another, said report shall show the warehouse from which same has been transferred and the warehouse to which same has been transferred,

the quantity thereof and the serial number of each of the packages so transferred.

3. Every person, corporation, association or partnership operating, owning or controlling such bonded warehouses, shall, at the time said reports herein provided for are made, pay to the Auditor of Public Accounts the tax of fifty cents per proof gallon upon each proof gallon of such spirits removed from the bonded warehouse owned, controlled or operated by such person, corporation, association or partnership, or transferred under bond out of this State, up to the date of making such report; and for the purpose of securing the payment of the license taxes herein provided for, the Commonwealth shall have a lien on all such spirits stored in such bonded warehouses, together with the other property of the bonded warehousemen used in connection therewith; and in all cases where the spirits so removed or transferred were owned or controlled by another than the bonded warehousemen, then the bonded warehouseman shall collect and pay the tax due on such spirits so removed or transferred under bond, and shall be subrogated to the lien of the Commonwealth.

4. Every corporation, association, partnership and individual engaged in distilling spirits, known as whisky or brandy or other species of double stamp spirits in this State, shall pay the license tax herein provided upon all such spirits so manufactured and removed from the premises without being placed in a bonded warehouse at the date of the removal of such spirits; and all such corporations, associations, partnerships and individuals engaged in the business of distilling such spirits in this State shall file month-



ly statements with the Auditor of Public Accounts, on blanks to be furnished by the Auditor, which statements must be sworn to and which statements shall show the number of proof gallons of such spirits so distilled and removed from the premises without having been stored in a bonded warehouse, and at the time of filing such statements shall pay to the Auditor of Public Accounts the amount due on such spirits so manufactured and removed; and for the payment of the taxes due under this provision, the Commonwealth shall have a lien upon all the machinery and the premises and the manufactured spirits made thereon, of the corporation, association, partnership or individual engaged in such distilling business.

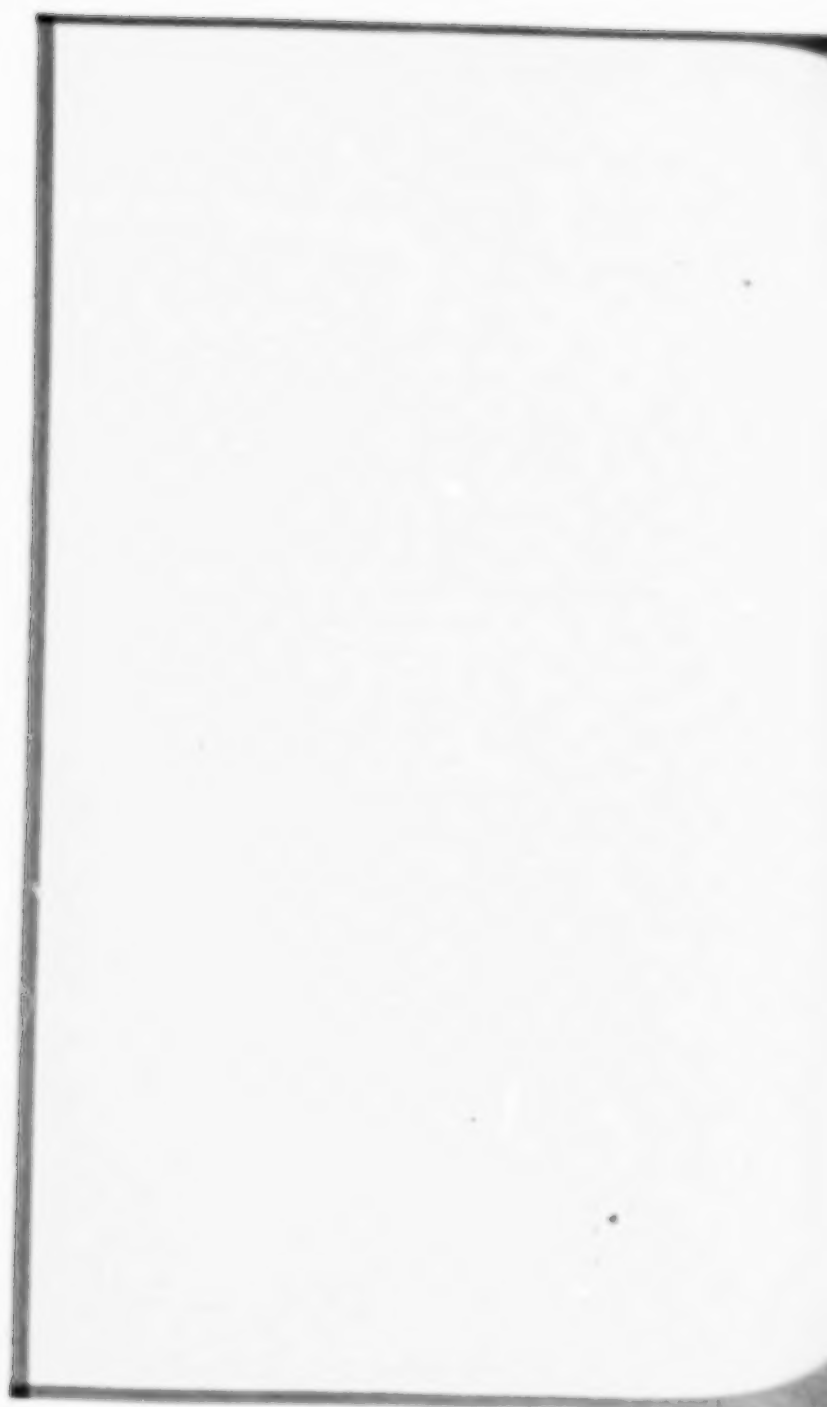
5. Every person, corporation, association or partnership failing to make the reports herein provided for, in the manner herein provided for, and failing to pay the taxes as they become due, as herein provided for, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than five hundred dollars nor more than one thousand dollars, and each day after the date such report is due that such person, corporation, association or partnership is in default shall be treated and considered as a separate offense.

6. The tax herein provided for, when collected, shall be distributed as follows: To the State Road Fund, sixty-five per cent thereof; to the General Expenditure Fund, thirty-five per cent thereof.

7. The license tax herein imposed shall be in lieu of all other license, franchise or excise taxes now imposed by law on persons, corporations, partnerships or associations engaged in business covered by this

Act; and all Acts in conflict therewith are hereby repealed, and especially there is hereby repealed Chapter 5 of the Acts of the Special 1917 Session of the General Assembly of Kentucky.

8. Whereas, many persons, corporations, associations and partnerships are now engaged in the business covered and licensed by this Act, without paying an adequate license tax to the Commonwealth of Kentucky therefor; and whereas, the liquor which they are handling and in which they are dealing is constantly in large quantities being removed from the bonded warehouses and disposed of, without the State securing an adequate license tax thereon, an emergency is hereby declared to exist, and this Act shall take effect from and after the date of its passage and approval by the Governor.



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# Supreme Court of the United States

OCTOBER TERM, 1920.

No. 582.

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Charles I. Dawson, Attorney General of the  
Commonwealth of Kentucky, and individ-  
ually, LOUISVILLE PUBLIC WARE-  
HOUSE COMPANY (a corporation); John  
J. Craig, Auditor of the State of Kentucky,  
and individually, - - - - - Appellants,

versus

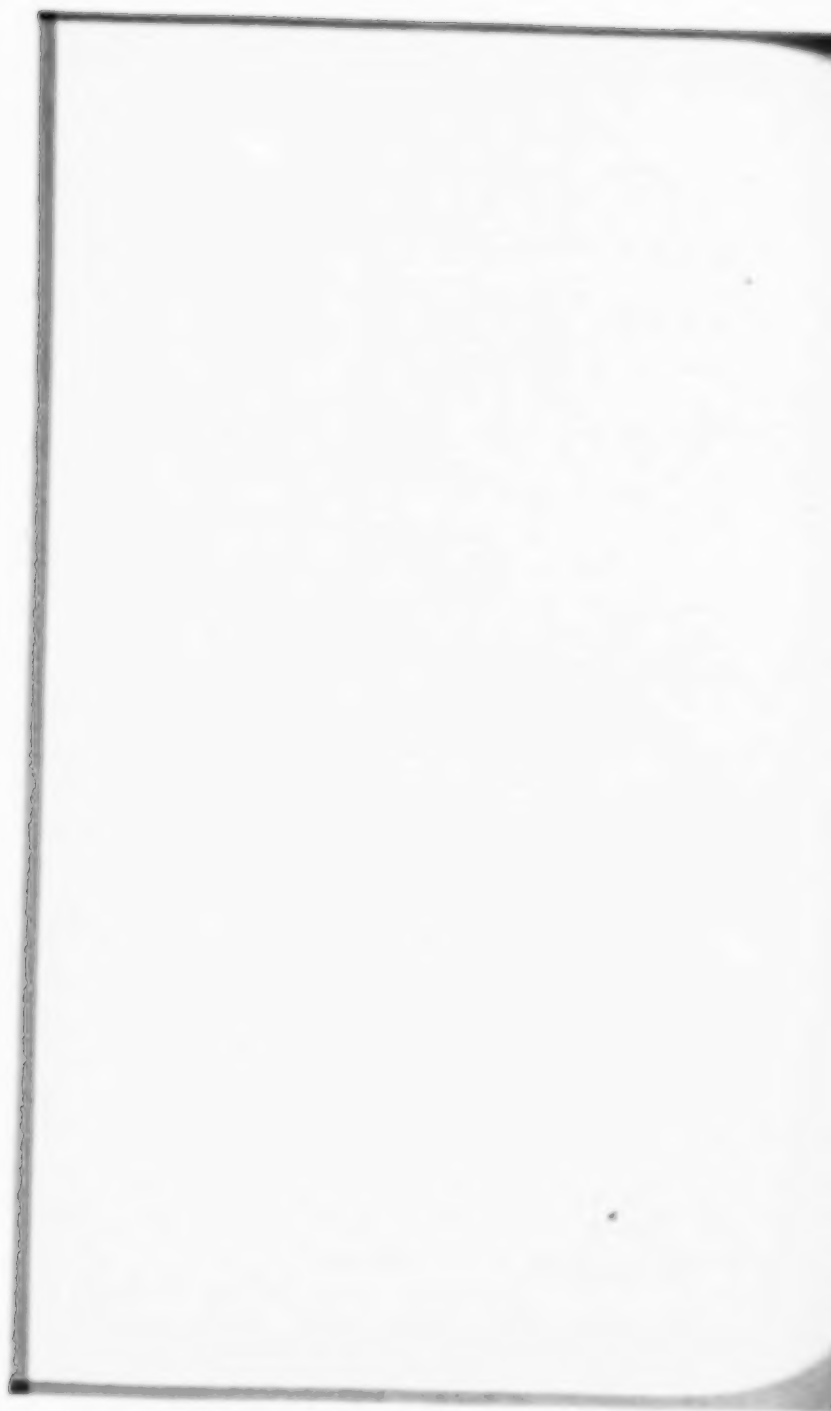
The J. & A. Freiberg Company (Incorporated), Appellee.

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## Brief on Behalf of Appellant, Louisville Public Warehouse Company.

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W. OVERTON HARRIS,  
*Counsel for Louisville Public Warehouse  
Company.*



# Supreme Court of the United States

OCTOBER TERM, 1920.

No. 582.

---

CHARLES L. DAWSON, ATTORNEY GENERAL  
OF THE COMMONWEALTH OF KENTUCKY,  
and individually, LOUISVILLE PUBLIC  
WAREHOUSE COMPANY (a corporation);  
JOHN J. CRAIG, AUDITOR OF THE STATE  
OF KENTUCKY, and individually, - - *Appellants,*

*versus*

THE J. & A. FREIBERG COMPANY,  
(Incorporated), - - - - - *Appellee.*

---

**BRIEF ON BEHALF OF APPELLANT, LOUISVILLE  
PUBLIC WAREHOUSE COMPANY.**

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## **STATEMENT.**

This is an appeal from an interlocutory injunction granted by a circuit judge and two district judges, sitting *in banc*, as provided by Section 266 of the Judicial Code. The injunction thus granted restrains the enforcement, operation and execution of an Act of the General Assembly of the Commonwealth of Kentucky upon the ground that it contravenes the Constitution of the United States.

### THE FACTS.

On March 12, 1920, an Act, passed by the General Assembly of Kentucky, went into effect. By this Act an "annual license tax" of fifty cents on every proof gallon of distilled spirits stored in a bonded warehouse is made payable to the Commonwealth of Kentucky by the warehouseman, even though ownership of the spirits be in a third person. The Commonwealth is given a lien on the spirits in the warehouse and a lien on the property of the warehouseman to provide payment of this tax. The warehouseman is subrogated to the lien of the Commonwealth in order that it may recover from the owner of the spirits the tax paid by the warehouseman in its representative capacity.

At the time this suit was instituted and the injunction was granted, the appellee, Freiberg Company, was the owner of certain distilled spirits in the warehouse of this appellant, Louisville Public Warehouse Company, which spirits were subject to the tax provided in the Kentucky Act referred to above. On the 22nd of April, 1920, the Freiberg Company demanded of the Louisville Public Warehouse Company that it be permitted to remove said spirits from this appellant's warehouse. This demand was refused, unless the tax of fifty cents on each gallon was first paid by the Freiberg Company. The tax remaining unpaid, the spirits remained in the warehouse of appellant, Louisville

Public Warehouse Company, over the protest of the Freiberg Company. This protest culminated in the proceedings which resulted in the interlocutory injunction, from which this appeal is taken, and which restrains the enforcement of the Kentucky Act.

### **THE POSITION OF THE LOUISVILLE PUBLIC WAREHOUSE COMPANY.**

It is apparent that appellant, Louisville Public Warehouse Company could not afford to permit the removal, or to surrender possession, of the spirits upon which it is, itself, liable to the Commonwealth of Kentucky for the tax in the sum of fifty cents per proof gallon and upon which it is entitled to a lien covering this amount, unless the tax be paid first.

If the Kentucky Act be valid and enforceable, the Commonwealth will look to the Louisville Public Warehouse Company for payment of the tax. In this event the Warehouse Company must rely upon its lien upon the spirits taxed for the amount which the Warehouse Company would be forced to pay to the Commonwealth. But until the validity or non-validity of the Kentucky Act, providing for this tax, be conclusively determined the Louisville Public Warehouse Company could not afford to surrender possession of the spirits or in any way impair the practical value of its lien upon the spirits rightfully belonging to the appellee, Freiberg Company, but stored in the warehouse of the Louisville Public Warehouse Company as bailee.



The position of appellant, Louisville Public Warehouse Company may be likened to that of a stakeholder, to the extent that it is disinterested in attacking, or defending, the validity of the Kentucky Act. Argument of this proposition is, therefore, dispensed with and left to the appellee and those appellants, representing the Commonwealth of Kentucky. It has been thought proper, however, that this relationship between the three parties be clearly stated.

Respectfully submitted,

W. OVERTON HARRIS,  
*Counsel for Louisville Public Warehouse Company.*



# Supreme Court of the United States

OCTOBER TERM, 1920.

**Nos. 439 and 582**

CHARLES I. DAWSON, ATTORNEY GENERAL OF  
THE STATE OF KENTUCKY, VICTOR A.  
BRADLEY, COMMONWEALTH'S ATTORNEY  
FOR THE FOURTEENTH JUDICIAL DISTRICT  
OF KENTUCKY, AND JOHN J. CRAIG, AUD-  
ITOR OF PUBLIC ACCOUNTS OF THE STATE  
OF KENTUCKY, . . . . . *Appellants,*

vs. 439

KENTUCKY DISTILLERIES & WAREHOUSE  
COMPANY, . . . . . *Appellee.*

AND

CHARLES I. DAWSON, ATTORNEY GENERAL OF  
THE COMMONWEALTH OF KENTUCKY, AND  
INDIVIDUALLY; LOUISVILLE PUBLIC WARE-  
HOUSE COMPANY (A CORPORATION), JOHN  
J. CRAIG, AUDITOR OF THE COMMON-  
WEALTH OF KENTUCKY, AND INDIVIDUALLY, . *Appellants.*

vs. 582

THE J. & A. FREIBURG COMPANY, . . . . . *Appellee.*

## PETITION FOR REHEARING.

We are aware that courts generally do not look with favor on petitions for rehearing, and that good practice demands that lawyers refrain from adding to the court's burdens by filing such petitions, except where something of vital concern can be offered for the court's con-

consideration. If we know how to value such matters we have three vital reasons to offer why the opinion of the court in these cases should be modified, if not withdrawn.

# I

The court in its opinion in these cases used this language:

"The case comes here by direct appeal under section 238 of the Judicial Code."

The court evidently was laboring under the impression that final judgments had been entered in the district courts, and that appellants prosecuted appeals from these final judgments. As a matter of fact, the order granting the appeal in each case shows the appeals were taken from an order awarding an interlocutory injunction, as is provided by section 266 of the Judicial Code. The statement in the opinion to the effect that "The case comes here by direct appeal under section 238 of the Judicial Code" imports to the judgment a finality to which it is not entitled, and which in our view of it was not intended by the court. If allowed to stand as the opinion of the court on final appeal, it will lead to confusion in the district court upon the return of the cases, as well as in the state courts, where an action is now pending to test the validity of the statute. As we understand the law, the legality of a statute of a state under the State Constitution must finally be determined by the highest court of that state, and inasmuch as this court in its opinion tested the validity of the statute solely under the State Constitution, the appellants feel that they should not be embarrassed in the Court of Appeals of Kentucky by a final utterance of this court on the proposition, when the character of the appeal did not justify this court in treating it as a final appeal.

## II.

We understand the rule to be that where an appeal is prosecuted under section 266 of the Code, from an order granting or refusing an interlocutory injunction, and where the construction of a state statute as affected by the State Constitution is directly involved and the state court of last resort (as in these cases, has not construed the particular statute under consideration, but has sustained the validity of similar taxing statutes, the Supreme Court will assume that such a construction is broad and comprehensive enough to sustain the validity of the statute assailed. *Pullman Co. v. Knott*, 235 U. S. 27. In this case a Florida statute imposing a license tax was being assailed as a property tax. A preliminary injunction had been refused by three judges; an appeal was prosecuted under section 266 of the Judicial Code direct to the Supreme Court from the order refusing the interlocutory injunction. Mr. Justice Holmes, speaking for the court, said:

"These considerations undoubtedly are very strong, but as we are dealing with the validity of the law under the State Constitution, a matter that must be decided finally by the State court, and as the State court has held other gross earning taxes to be license taxes (*Afro-American Industrial & Benefit Association v. State*, 61 Fla. 85-89, So. 383), we are of the opinion that if this act is to be overthrown it should not be overthrown by us. It is true that there are possible distinctions between this case and the Florida decisions cited, but it seems to us not improbable that the Supreme Court has in view a principle broad enough to cover the case at bar."

We fail to see any reason that can be logically urged against the general application of this rule in Federal procedure, but surely no reason can be asserted, logical or otherwise, against its application in a preliminary

hearing, where the decision is confined to the approval or disapproval of an interlocutory injunction.

The Kentucky Court of Appeals, in two well considered cases of comparatively recent date, was called upon to test the constitutionality of two statutes imposing an occupation tax very similar to the statute here assailed, in which it sustained the validity of said statutes, holding the tax imposed thereunder to be an occupation tax and not a property tax. In fact, one of the statutes construed imposed a license tax on the business of manufacturing distilled spirits and storing same in a bonded warehouse in this State. This statute was in its material provisions copied into the Vance Act. The validity of this statute had been upheld by the Court of Appeals of Kentucky long before the district courts granted the preliminary injunctions. (See *Greene, Auditor v. E. H. Taylor, Jr. & Sons*, 184 Ky. 739). A similar statute imposing a license tax on producers of oil, to be measured in the number of gallons of oil produced, as shown by the pipe line receipts, was sustained by the Court of Appeals in a well considered opinion in the case of *Raydure v. Board of Supervisors of Estill County*, 183 Ky., page 84. In the absence of a decision of the highest State court construing the particular statute in question, we submit that the decisions of said court sustaining the validity of similar taxing statutes should have been followed by the Supreme Court in determining the nature of this tax. It may be said to be the settled law in Kentucky that owning property in the State which was acquired for the purpose of making a profit, or to await a convenient season to put same to use, is doing business in the State which may be the subject of a license tax. *Greene, Auditor v. Kentenia Coal Corporation*, 175 Ky. 661.

Mr. Justice Brandeis, speaking for the court in the opinion, says:

"Here we are concerned only with the taxes which are alleged to be on the business of owning, and storing such spirits in bonded warehouses. The question is whether as to such this fifty cents a gallon tax is an occupation or property tax."

We submit this is a restricted definition of the business taxed. The Legislature never intended to take parts of the business and impose a tax thereon without relation to the whole. The court has adopted a construction in this restricted definition which makes the law invalid, when the way was unobstructed for a broader definition which would have sustained its validity. It is elementary that where two views of the law appear from the language employed, one of which would uphold the law, the other of which would lead to its overthrow, the court will, if possible, adopt the view which will sustain the law. May we not insist that this canon of statutory construction has been reversed in the case at bar?

The opinion applies to the Kentucky Distilleries & Warehouse Company, as well as to The J. & A. Freiburg Company. It is conceded that the Distillery Company is one of the large manufacturers of distilled spirits in Kentucky, and that it yet owns and holds large quantities of liquor which it manufactured in this State and which is being held in its warehouses in Kentucky, fulfilling the dual purpose of undergoing the ripening or aging process and awaiting a propitious market. Can it be said (and does the court mean to say) as to the Distilleries Company, "We are only concerned here with taxes which are alleged to be on the business of owning and storing such spirits in bonded warehouses?" The fact that a part of the business has already been performed which is sought to be taxed does not invalidate the statute under either the State or Federal Constitution. *Kentucky Union Company v. Kentucky*, 219 U. S. 140.

## III.

It is true the validity of this particular statute had not been passed upon by any Kentucky court at the time these cases were finally argued and submitted, but while the Supreme Court was recessed after its January Session, 1921, one of the Judges of the Kentucky Court of Appeals handed down an opinion in a case pending in the Franklin Circuit Court, wherein E. H. Taylor, Jr. & Sons was plaintiff and John J. Craig, et al., were defendants, dissolving a preliminary injunction granted by the Franklin Circuit Court, and in a learned and exhaustive opinion upheld the validity of the statute here assailed. This opinion not only interprets the statute in the light of section 181 of the Constitution, holding the tax imposed to be an occupation or license tax, but clearly defines the occupation sought to be taxed. The learned Justice reviews and collates the Kentucky authorities bearing on these questions, and as the question is one of "local law" and one that must finally be determined by the State courts, this opinion has a vital and important bearing on the question here for determination. This opinion was rendered February 18, 1921, and before these cases were decided by this court, but as the court was not in session, there was no way by which counsel could bring said decision to the court's attention. We deem it proper in this connection to state that notice was given to opposing counsel that the opinion of the Kentucky Judge would be offered in open court on February 28, 1921, and counsel were in court on said date prepared to make this motion pursuant to the notice, but this court's opinion was delivered at the convening of the court on said day, and before motions were had. The opinion of the Judge of the Kentucky Court of Appeals was rendered under section 296 of the Civil Code, and is not the opinion of the Court of Appeals. It is the law of the case, however, until reversed or modified by the Court



of Appeals on the final hearing. Entertaining the view we do of the importance of this opinion and its bearing on the questions here involved, especially when considered in connection with the other Kentucky cases construing similar statutes, we have considered it proper to call the court's attention thereto, and for the court's convenience we are printing said opinion in full as an appendix to this petition.

The case of E. H. Taylor, Jr. & Sons v. Craig, et al., in which Judge Sampson rendered his opinion, dissolving the preliminary injunction, will be appealed to the Court of Appeals of Kentucky and counsel representing the parties have agreed that on the 11th day of April, 1921, the first day of the April Term of the Kentucky Court of Appeals, a joint motion will be entered to docket, advance and submit said case for hearing, on the ground that a public question is involved. The Court of Appeals of Kentucky, therefore, will at an early date pass upon the validity of this statute, and, in view of its previous decisions construing similar statutes, and in view of the opinion of Judge Sampson upholding the validity of this particular statute, may we not indulge the belief with some measure of certainty that the validity of this statute will be upheld by the highest State tribunal? If the opinion of this court, therefore, is allowed to stand as a final adjudication, the State may find itself confronted with an anomalous situation, should the opinion of the Kentucky Court of Appeals be different from the opinion of this court.

#### CONCLUSION.

We, therefore, earnestly submit the opinion in this case should be modified or withdrawn, and appellants given a rehearing:

(1) Because the judgment purports to be a final determination, when the appeal was prosecuted under section 266 of the Code to determine whether the prelimi-

nary injunction should have been granted pending the litigation.

(2) Because the court in interpreting a State statute as affected by the State Constitution, has failed to consider or follow the decisions of the highest State tribunal construing similar taxing statutes.

(3) Because since this case was argued and submitted, a Judge of the Kentucky Court of Appeals, in dissolving a preliminary injunction granted by a State Circuit Judge, has sustained the validity of the statute here assailed, which decision in connection with the decisions of the Kentucky Court of Appeals construing similar taxing statutes, has an important bearing upon the case at bar.

All of which is respectfully submitted.

CHAS. I. DAWSON,  
*Attorney General.*

W. T. FOWLER,  
*Assistant Attorney General.*

### CERTIFICATE OF COUNSEL.

The undersigned, counsel for Charles I. Dawson, Attorney General, and John J. Craig, State Auditor, et al., appellants in the above styled actions, do certify that the foregoing petition for a rehearing is filed in good faith and not for purposes of delay; and that in their opinion said petition is well founded in law and a rehearing should be granted.

CHAS. I. DAWSON,  
*Attorney General.*

W. T. FOWLER,  
*Assistant Attorney General,  
Counsel for Appellants.*

## APPENDIX

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**Copy of opinion rendered by F. D. Sampson, a Judge of the Court of Appeals of Kentucky, February 18, 1921, dissolving an injunction issued by the Judge of the Franklin Circuit Court in the case of E. H. Taylor, Jr. & Sons vs. John J. Craig, Auditor, et al., Defendants.**

---

“This case is before me, a judge of the Kentucky Court of Appeals, on motion to dissolve the temporary injunction granted by the judge of the Franklin Circuit Court. There is involved in this motion the construction and constitutionality of an act of the last General Assembly of Kentucky entitled:

‘An act imposing an annual license tax upon every corporation, association, partnership and

individual engaged in the business of manufacturing distilled spirits known as whiskey or brandy or other species of double stamp spirits in this state, and upon every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in the state, and in removing same therefrom for the purpose of sale, or for any other purpose; providing for monthly reports by distilleries and bonded warehousemen, for the purpose of ascertaining the amount of tax due; providing for monthly payments of the amount of license tax due; fixing a penalty for failure to make such monthly report and settlement; providing for the manner of distribution of the tax so collected; repealing all other license, franchise and excise taxes of the business covered by this act, and declaring an emergency to exist.'

This act is now chapter 13 of the Acts of 1920.

The plaintiff, E. H. Taylor, Jr. & Sons, is a corporation and has heretofore been engaged in manufacturing distilled spirits known as double stamp spirits at its distillery in Kentucky. In connection with its distillery it owned and operated a distillery bonded warehouse, and the liquor manufactured by the distillery was stored in the bonded warehouse of the plaintiff, after which warehouse receipts were issued against same, and these warehouse receipts from time to time in the course of trade were sold to purchasers throughout the United States and much, if not all, of the liquor now stored in the distillery bonded warehouse of the plaintiff is owned by purchasers of these warehouse receipts. Plaintiff is still operating as a warehouseman and is bottling and shipping the liquor stored in said bonded warehouse on order of its customers from time to time. The record discloses that the plaintiff has not abandoned its business as a distiller, but that it is its purpose at some future date and in more propitious times to resume the

business of distilling whiskey and selling same for the purposes now permitted by law.

The plaintiff in its petition assails the law on the ground: (1) That it is an unlawful exaction and exercise of legislative power. (2) That the law is prohibitory and confiscatory in its character. (3) That it provides for unequal taxation and violates sections 171 and 172 of the State Constitution. (4) That the act is discriminatory in its nature and adds a greater burden on whiskey than on other personal property or property of like value, and a greater burden on the business and occupation taxed by the law than on other occupations of equal and like character or value. (5) That the enforcement of the act will result in taking private property for public purposes, without just compensation and without due process of law, and will deprive the owner of such and the warehouseman in charge thereof of the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States. We shall consider these five contentions in the order stated.

The original record made in the circuit court is before me.

Inasmuch as the defendant makes no question of the jurisdiction of a court of equity to issue an injunction herein, we pass this question and proceed to a consideration of the case on its merits.

Section 1 of the act is as follows:

“Every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits, known as whiskey or brandy or other species of double stamp spirits in this state; and every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in

this state, and in removing same therefrom for the purpose of sale, or for any other purpose, shall pay an annual license tax to the Commonwealth of Kentucky of fifty cents on every proof gallon of said distilled spirits so manufactured or stored in a bonded warehouse, or withdrawn from a bonded warehouse, or transferred therefrom under bond out of the Commonwealth of Kentucky."

Section 2 of the act deals with the making of the reports by the warehouseman in whose place the liquor is stored.

Section 3 of the act is as follows:

"Every person, corporation, association or partnership operating, owning or controlling such bonded warehouses, shall, at the time said reports herein provided for are made, pay to the Auditor of Public Accounts the tax of fifty cents per proof gallon upon each proof gallon of such spirits removed from the bonded warehouse owned, controlled or operated by such person, corporation, association or partnership, or transferred under bond out of this state, up to the date of making such report; and for the purpose of securing the payment of the license taxes herein provided for, the Commonwealth shall have a lien on all such spirits stored in such bonded warehouses, together with the other property of the bonded warehousemen used in connection therewith; and in all cases where the spirits so removed or transferred were owned or controlled by another than the bonded warehouseman, then the bonded warehouseman shall collect and pay the tax due on such spirits so removed or transferred under bond, and shall be subrogated to the lien of the Commonwealth."

Section 5 of the act provides a penalty of not less than five hundred dollars nor more than one thousand dollars for persons subject to the act failing to report

and pay the tax as therein provided, and each day that the offender is in default is declared by this section to be a separate offense.

Section 7 of the act provides that the license tax imposed by the act in question shall be in lieu of all other license, franchise or excise taxes now imposed by law on persons, corporations, partnerships or associations engaged in the business covered by the act, and repeals all laws in conflict with the new act, and especially chapter 5 of the acts of the special 1917 session of the General Assembly. This act of the special 1917 session imposed a license tax of two cents per proof gallon upon every corporation, association, company, co-partnership or individual engaged in the business or occupation of manufacturing distilled spirits known as whiskey, brandy or other species of double stamp spirits in this State, and on every owner or proprietor of a bonded warehouse in this State in which such spirits are stored, and the warehouseman was required to make the reports under that law and collect and pay the tax. The privilege tax of which complaint is made is not an unlawful exaction, nor is it the result of an unlawful exercise of legislative power, as contended by plaintiff, if there is warrant in our Constitution for such legislative action, and the tax was levied by that body in the way and manner authorized by the Constitution. So the first contention of plaintiff is one involving a construction of the Constitution of Kentucky, and an inquiry whether the terms of that instrument are broad enough to warrant a privilege tax such as here involved, and this we shall first consider.

A license or excise tax may be levied for one or both of two purposes: (a) Revenue; (b) regulation under the police power. It must be admitted that the State under its police power has the right to regulate any and all kinds of business, to protect and promote the public health, morals and welfare, subject only to



the reservation of reasonable classification. 6 R. C. L. 217.

(1) It is insisted by the defendant that this is an occupational or excise tax, and as such is authorized under section 181 of the Constitution of Kentucky. This section of the Constitution, in part, and in so far as applicable, is as follows:

“The General Assembly may, by general law only provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations and professions, or a special or excise tax.”

Under this provision of the Constitution the legislature had the undoubted right to impose an occupational tax for the purpose of raising revenue; nor is the legislature required to impose a similar tax upon each and every occupation in which its citizens engage. It may tax some and exempt others. It may even go to the extent of classifying persons in the occupation taxed, and, if the classification is along reasonable and fair lines, it will not be objectionable. An occupational tax is one, not upon property, but upon the pursuit which a man chooses to acquire property and support himself or family. It is essential, however, to the constitutionality of the legislation and tax laid thereunder that it apply equally to all persons of a given class. The amount of a license tax is discretionary with the legislature, and may be fixed at any sum which will not be prohibitive. 25 Cyc. 612, 17 R. C. L., page 504. *Owen County v. Cox & Co.*, 132 Ky. 743; *Commonwealth v. Hazel*, 155 Ky. 32.

In the case of *Hager, Auditor v. Walker*, 128 Ky., page 1, this court, in discussing the power of the legislature to tax occupations under section 181 of the Constitution, used this language:



"The authority to tax under this section is as far reaching and as sweeping as language can make it. It would be difficult to find three words that cover wider fields of employment than 'trades,' 'occupations' and 'professions.' Under its authority to tax them the General Assembly has the power and the right to tax every business and every individual in the state—the merchant, trader and banker; the lawyer, minister and doctor; the mechanic and farmer. Indeed, it would be difficult to mention a person who has not some trade, occupation or profession, and, if he has, the authority to tax him is granted and this without respect to the nature or character of the trade, occupation or profession, or whether it be humble or great, large or small. Nor does the Constitution undertake to place any limitation upon the amount of tax that may be imposed, although it may be conceded that if it shall be so unreasonable or arbitrary as to amount to a confiscation of property or a denial of the right to engage in a particular trade, occupation or profession, the courts will interpose to protect the class of persons affected from this oppressive burden, on the ground that it was a violation of the principles recognized and established in the Bill of Rights, declaring that all men have the right of seeking and pursuing their safety and happiness and the right of acquiring and protecting property. . . ."

An occupation is a vocation, calling, trade or business which one follows, or which engages one's time or attention, in whole or in part, in an effort to procure a living for himself and family. 29 Cyc. 1344. Any pursuit, calling, business or course of dealing which one may in whole or in part, adopt or pursue for gain, profit or a livelihood is an occupation within the meaning of our constitutional provision allowing the levy of a privilege tax on occupations, and the legislature has the discretion of singling out and designating any one or more of such pursuits as an occupation and subjecting it or them to a

privilege tax or taxes. If one is engaged or occupied in whole or in part for gain or profit, in investing money in spirituous liquors, with a hope of an advance in the market price, for gain, can it be said that he has no occupation? Certainly, if he engages in the manufacture of such spirits, he has an occupation. And is it not likewise true if he invests money in it, stores it in a warehouse for the purpose of ageing, mellowing and perfecting it? The owner of whiskey may store it in a warehouse or not at his option. He is not bound to do so. If he desires the privilege of storing and leaving it in a warehouse for the purpose of ageing and perfecting it, for safe-keeping, for higher prices, for the purpose of postponing the payment of the revenue and excise taxes, or for any or all of these or other reasons, he may, in the discretion of the legislature, be required to pay an excise tax for the privilege of so doing. While the mere right to acquire and own property is not generally held a subject of excise tax, any use of property so owned which is not an incident of such ownership may be the subject of a privilege tax. The storing of whiskey in a warehouse is not necessarily an incident of ownership of such property, for the owner may make other disposition of it, and the use or privilege of so storing the same may therefore be subjected to a privilege tax such as contemplated by this act. Granted that either of these things is such an occupation as may be subjected to a license or privilege tax, does it not follow that the legislature may put them all together as one business or occupation and levy a privilege tax thereon?

In discussing what constitutes a business or occupation subject to a license tax, we in the case of *Greene, Auditor v. Kentenia Corporation*, 175 Ky. 669, said:

"It seems to be conceded by counsel for plaintiff that if their client was actually engaged in actively

using in any way the land which it has purchased and now owns in this state, consisting of many thousands of acres (valuable for coal and timber) that it would be competent for the state to demand and for it to pay the tax, as, according to counsel's interpretation, it would then be 'doing business' in the state. But we do not construe that phrase to be confined to such a narrow meaning. When plaintiff invested its capital in the coal and timber land which it purchased in this state, it did so for one of two purposes—that of speculation by holding the land until it naturally increased in price, or to reap a profit from it by operating it either in the way of cultivation, mining, getting timber from it, or otherwise, so as to make it profitable. It avers in its pleading that it is doing neither of the latter, and therefore it is not doing business in this state. But, according to our conception, the land need not be in actual use in order to constitute *doing business*. The average speculator in land (and there are many of them) if asked in what business he was engaged would answer: 'Speculating in land.'

"One of the definitions of business given by Mr. Webster is 'buying and selling,' and when one, either as an individual or corporation, puts his money into land rather than other investments, his act is necessarily a choice between the various means open to him by which he may make his money yield him a profit."

So it appears that any investment made for gain or profit and which gain or profit is, in whole or part, in the future, amounts to engaging in a business or occupation within the meaning of section 181 of our Constitution, and it is competent for the legislature to impose a license tax upon such business or occupation.

While the constitutional grant to the lawmaking body of power to impose a tax on "the various trades, occupations and professions" is broad and comprehensive, yet this phrase is greatly aided and enlarged by

the further grant of the power by the same section to impose an excise tax, which is defined to be: One imposed upon an act, the engaging in an occupation or the enjoyment of a privilege. 26 R. C. L. 236; one laid on the manufacture, sale or consumption of commodities within a country, or upon certain callings or occupations, often taking the form of exactions for license to pursue them. *Pollock v. Trust Co.*, 157 U. S. 429. Such taxes only look to a particular subject and levy burdens with reference to the act of manufacturing them, selling them, etc. They are or may be as varied in form as the acts or dealings with which the taxes are concerned. *Knowlton v. Moore*, 178 U. S. 41.

In the case of *Booth v. Commonwealth*, 130 Ky. 105, we said:

"'Excise' is a term of very general signification, meaning tribute, custom, tax, tollage or assessment, and in recent years the courts have so enlarged its meaning as to declare that an inheritance tax is an excise tax."

Continuing, we said in *Hager, Auditor v. Walker*, *supra*:

"We believe that it is competent for the Legislature under this section (181 of the Constitution) by general law, for state purposes, as well as by a general law delegating the power to the municipalities mentioned, to divide trades, occupations and professions into classes and impose a different license fee upon each class that the trade, occupation or profession may fairly and reasonably be divided into. To illustrate: Dealers in hardware might be divided into wholesale and retail dealers. And trades, occupations and professions may be further classified according to the volume of business done by them. Nor is the General Assembly, either by general law for state purposes, or general law in aid of or for

the benefit of municipalities, required to impose the license fees that may be levied upon all trades, occupations and professions. Any one or more trades, occupations and professions may be singled out for taxation and all the others not thus selected be exempted. It will thus be seen that according to our construction of this section, it is susceptible of wide and varying application."

The case, *supra*, also expressly holds that the uniformity of taxation provided for by section 171 of the Constitution of Kentucky applies to taxation on property, and not to license taxation authorized by section 181 of the Constitution, except that every member or pursuer of a trade, occupation or profession and every subdivision and classification thereof within the jurisdiction where the tax is imposed shall bear the same license tax as every other member or pursuer of that particular calling or business. Applying the rule just stated, it will be seen that if the tax is an occupational tax, under section 181 of the Constitution, then the claim of plaintiff that it imposes unequal taxation and that it is discriminatory in its nature and adds a greater burden on the business and occupation taxed than on other occupations of equal and like character or value, is without merit. We think it may be said without hesitation that if this law can be upheld as a valid exercise of legislative authority, it must be on the theory that it is an occupational or excise tax and not a property tax. Viewed as a property tax, it would undoubtedly violate sections 171 and 172 of the Constitution of Kentucky, providing for equality and uniformity in taxation; and, moreover, to hold it to be a property tax would be to reach a conclusion wholly at variance with the plain purpose and expressed intention of the legislature.

It therefore becomes important to determine whether or not the legislation is justified under section 181 of the

Constitution, above quoted. It is the claim of the plaintiff that the law in question singles out and taxes three separate and distinct occupations, namely: (a) distilling; (b) storing in bonded warehouses; and (c) removing whiskey from bonded warehouses; and that to tax the acts of owning and storing in bonded warehouses as an occupation, is undertaking to tax as an occupation something not contemplated as an occupation under section 181 of the Constitution, and that this attempt of the legislature to declare such acts to be an occupation is capricious and unreasonable. We do not concur in this view. The use of property of certain classes, especially luxuries such as whiskey, has always been considered a proper subject of excises. *Hylton v. U. S.*, 3 Dall. 171, U. S. (L. Ed.) 556; 26 R. C. L. 236. It is not ownership which is the subject of taxation, but the election during the taxing period of the owner to take advantage of one of the elements which are involved in ownership, namely, the right to use it. 26 R. C. L. 236. Taking the whole act together, we are of the opinion that the legislature was attempting to impose an occupational tax upon the one entire business of manufacturing, storing and preparing distilled spirits for the market, and that it was not the intention of the legislature to tax the business of distilling as one occupation, storing in bond as another occupation, and removing from bond as a third occupation, except in cases where the act of manufacturing is completed but the liquor yet remains in storage unreleased from bond. It appears from a reading of the United States Statutes relating to the manufacture and warehousing of double stamp spirits that the manufacturer may or may not place his product in a warehouse, as he may deem best, provided he complies with the law in that respect. He is not, however, exempt from the privilege tax imposed by this statute under consideration, if he decides to dispose of his liquor without

warehousing it, but if he does so dispose of it and pays the tax thereon to the State, as provided in this act, such liquor is not again subject to tax under this act, as only one tax of fifty cents on the gallon can be exacted. We think the real purpose of the legislation in question was to tax the one continuous business as one business, and leave to each of the agencies engaged therein the adjustment of the payment of same among themselves, the legislature for obvious reasons making the warehouseman the collector of the tax. Section 3 of the act in question clearly shows that it was the purpose of the legislature that only the one tax of fifty cents per proof gallon for the entire business should be collected, as it provides that the warehouseman at the time the reports showing the release of whiskey from the bonded warehouse are made shall pay to the Auditor the tax of fifty cents per proof gallon upon each proof gallon of spirits removed from the bonded warehouse, owned or operated by such person, or upon each proof gallon of spirits transferred from such warehouse out of the State. There is nothing whatever in this section to indicate that it was the purpose of the law to require the warehouseman to collect or pay but the one fifty cent tax per gallon on all the whiskey that was placed in and passed out of his warehouse, regardless of by whom it was withdrawn. This construction of the law is in harmony with the construction of the act of the special session of 1917, which this law repeals. It is a matter of general knowledge in this State that under the act of the special session of 1917 only the one tax of two cents per gallon was collected upon each gallon of distilled spirits placed in and removed from bonded warehouses.

For the reasons indicated, and without passing upon the right of the legislature to tax as an occupation the single acts of owning and storing liquor in bonded warehouses, we are of the opinion that this tax



was intended to be and fairly construed is a tax upon the entire business of distilling and preparing whiskey for market, which includes the business of storing in bonded warehouses, and as such is within the scope of section 181 of the Constitution, provided, of course, it is not prohibitory or confiscatory in its character.

(2) It is contended by the plaintiffs that if the tax is viewed as an occupational tax it is invalid and unconstitutional, for the reason that it is so large as to be prohibitory and confiscatory, by which is meant that the excise tax is so great as to amount to a virtual taking of the property of plaintiff and other owners of liquor without just compensation, or, if not that, then the excessiveness of the tax will so greatly increase the price of such liquor as to repel prospective purchasers and thus, in effect, prohibit the sale of the stored liquor and ruin the business or occupation taxed. It is well settled in Kentucky that while the power to impose a license tax on occupations and trades, under section 181 of the Constitution is very comprehensive, it is not an unlimited power. Only those excise laws whose general operation is confiscatory and oppressive are unconstitutional. 26 R. C. L. 238. It is generally agreed, however, that the amount of a license tax is a matter in the discretion of the legislature, and courts will not review the action of the lawmakers, unless an abuse of discretion is apparent. 17 R. C. L. 557; *Hall v. Commonwealth*, 101 Ky. 382; *Tobacco Co. v. City of Hopkinsville*, 174 Ky. 189. This doctrine is well stated in an opinion by the Supreme Court of Tennessee in the case of *Knoxville, &c., O. R. Co. v. Harris*, reported in 99 Tenn. 684, and 53 L. R. A. 930, wherein it is said:

“If the legislature has the legal right to impose a privilege tax the amount of the imposition is a matter within its discretion. ‘Our only concern is



with the validity of the tax; all else lies beyond the domain of our jurisdiction.' *Delaware Railroad Tax*, 18 Wall 231, sub nom.; *Minot v. Philadelphia W. & B. R. Co.*, 21 L. Ed. 896; *California v. Central P. R. Co.* 127 U. S. 1, 41, 32 L. Ed. 150, 157, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; *Home Ins. Co. v. New York*, 134 U. S. 594, 33 L. Ed. 1025, 10 Sup. Ct. Rep., 503; *Jenkins v Ewin*, 8 Heisk, 477."

The Supreme Court of the United States has held that it is no part of the function of a court to inquire into the reasonableness of the excise, either as respects the amount or the property upon which it is imposed. *Patton v. Brady*, 184 U. S. 608. And further, that though an excise tax is so onerous as to amount to a destruction of the business, or even if intended to do so, it is within the power of Congress and the courts have no power to revise its judgment. *McCray v. U. S.*, 195 U. S. 27. In stating the rule in the case of *Owen Co. v. Cox & Co.*, 132 Ky. 238, we said: "The reasonableness of a license fee imposed as a tax is a question for the taxing power, and the courts will not interfere with its discretion unless the tax shall amount to a prohibition of a useful or legitimate business." The tax may not, however, be so excessive under our rule as to be prohibitive of the business, and this is the sole test. It is not prohibitive, and therefore not unconstitutional, if the business can be carried on with reasonable profit. A great deal of proof in the way of affidavits was introduced both by the plaintiffs and by the defendants on the hearing of the motion before the circuit judge, all of it being on the question of whether or not the tax in practical operation was prohibitive of the business taxed.

One of the reasons assigned by the plaintiff for contending that the tax is prohibitive involves a construction of the statute. It will be noted that in the title and in section 1 of the act the word "annual" is used in con-

nection with the words "license tax," and it is suggested by plaintiff that this language imposes a tax of fifty cents per proof gallon for each proof gallon of spirits stored in a bonded warehouse for each year same may remain in such warehouse. We can not agree with this construction of the statute. The act when taken as a whole clearly shows that the tax is not cumulative, increasing at the rate of fifty cents for each year the whiskey may remain in a bonded warehouse. In a sense the tax is an annual license tax, and the amount of this annual license tax is determined by multiplying the number of proof gallons removed in any one year from bond by fifty cents per gallon. Had the legislature intended that the tax should be a cumulative one, at the rate of fifty cents per gallon per year, it would have provided in the law some means by which the Auditor, who is the collecting agent of the State, could have known how many years each gallon removed from bond had remained in bond and subject to the tax. To hold that the tax is an annual cumulative one would necessarily result in rendering the law invalid, on the ground that it would be prohibitive. The statute is clearly open to another and more reasonable construction, as pointed out above. It is the duty of a court, where a law is capable of two constructions, one of which will render it valid and the other invalid, to adopt that construction which will sustain the validity of the law, if such a construction does not do violence to the plain purpose of the legislature in enacting the law. The purpose of this legislation, manifestly, was twofold: (1) To regulate the business of manufacturing, storing and releasing liquors under the police power of the State; (2) to raise revenue. The construction we are putting upon it will, unquestionably, facilitate both these purposes. Moreover, the presumption is that an act of the legislature is within that body's rights under the Constitution. All reasonable intend-

ment should be in favor to its fairness and justice. 36 American Reports 518; Gray on Taxation, page 720. Courts will not, therefore, adopt a construction of a statute which will invalidate it if there is another construction of which the statute is reasonably susceptible. 6 R. C. L. 78, 101; Standard Oil Co. v. Commonwealth, 82 S. W. 1020; 25 Cyc. 612.

As was said in the case of Weyman v. City of Newport, 153 Ky. 491:

"In the construction of ordinances the intention of the law-making department should be carried out, if this can be done consistently with the fair reading of the ordinance, and likewise an ordinance should be so construed as to sustain its validity when it is reasonably susceptible of this construction.

"In other words, if an ordinance is open to two constructions, one of which would uphold its validity and the other defeat it, that construction will be adopted which will sustain the validity of the ordinance."

We can not on the proof contained in the record hold that the tax is prohibitive of the occupation taxed. We think, taking the entire record on this point, it shows that the owners of liquor stored in bonded warehouses in Kentucky, whether they be distillers or whether they be holders of warehouse receipts, are able and have been able during all the time the law has been in effect to dispose of the product owned by them at a fair and reasonable profit.

It appears from the affidavit of G. J. Jarvis, tax clerk in the Auditor's office, that there have been removed from bond and the fifty cent tax collected on more than four million gallons of whiskey from the date the law became effective in March last up to the first day of December, 1920. The record further discloses that at the time the law became effective a fair and reasonable

price for whiskey, when sold through the medium of warehouse receipts, was one dollar to one dollar and twenty-five cents per gallon, regardless of whether it was stored in Kentucky or elsewhere. It appears from the proof that the same price is now being obtained by the owners of liquor stored in Kentucky, when it is sold through the medium of warehouse receipts, the purchaser assuming and paying the tax. The profit to the owner is, therefore, the same now as before the imposition of the tax when it was not only fair but entirely satisfactory to the seller. It further appears that for whiskey stored outside of Kentucky the owners are realizing from one dollar and fifty cents to as high as two dollars per gallon for same, when sold through the medium of warehouse receipts. This would indicate that owners of liquor stored outside of Kentucky have taken advantage of the law to profiteer and secure for themselves an additional profit, but not with a purpose to nor have they put the owners of Kentucky stored liquors out of business. The owner of Kentucky stored whiskey is able to and does pass the tax on to the consumer without reducing his profit below the margin he was making at the time of the effective date of the law. The record further shows that by bottling his whiskey in bond, the owner of Kentucky stored whiskey can sell same in the market at a still larger profit, and that many of the owners of liquor are adopting this plan of disposing of their stock. The tax is, therefore, clearly neither prohibitory nor confiscatory of the business, as it affects the liquor now on hand.

Plaintiff insists, however, that while the tax may not be so heavy as to prevent the disposition of the stocks of liquor now on hand, that it will prevent it resuming business after the present stock has been disposed of; that whiskey can be manufactured in other states as cheaply as it can be manufactured in Kentucky, and that dis-

tilleries will start up in other states, and by reason of the fifty cent tax imposed by Kentucky plaintiff will be unable to meet outside distillers in price competition. It is difficult for the court to believe that the competition will be as keen in the whiskey business after the disposition of the stocks now on hand as it is now, but, however that may be, the court could only speculate as to conditions which will then obtain. A court is not authorized to enter the realm of speculation in order to hold a law unconstitutional.

(3) The act does not, in the light of what has already been said, violate section 171 of our Constitution, which provides for uniformity of taxation, for, as we have already pointed out, it is not lacking in equality or uniformity if it places the same burden upon all persons or corporations embraced in a given class or subdivision thereof engaged in the designated business or occupation taxed. *Weyman v. City of Newport*, 153 Ky. 487; *Smith v. Commonwealth*, 175 Ky. 299. Moreover, it is generally held that the requirement of equality or uniformity does not apply to occupational or privilege taxation, but only to taxation of property or persons. *Gray on Taxation*, page 702.

(4) Neither is the statute open to the charge of discrimination against the business taxed, for a license tax is not discriminatory within the meaning of that prohibition if it does not arbitrarily or capriciously impose a different fee or license upon different members of the same class. The rule is well stated as follows in 17 R. C. L., pages 507, 508, 138 Ky. 738:

"Generally speaking, the state, acting on occupations carried on within the state, may encumber some of them with a tax or license fee, and leave other occupations, dissimilar in tendency, though not in nature, to the free will of those who might

be inclined to engage in them. It is essential, however, to the constitutionality of such tax laws that they apply equally to all persons of a given class. If the tax so applies it is sufficiently uniform and equal, but a tax which discriminates between different members of a class or exempts certain members of a class is void."

(3) Any tax is, in a sense, a taking of private property for public purposes, but, nevertheless, the right to levy and collect taxes inheres in sovereignty.

"Regulations respecting the pursuit of a lawful trade or business, being an exercise of the police power, are within the authority of the state, and form no subject for federal interference unless they are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily and in a manner wholly arbitrarily interfered with or destroyed without due process of law, or unless other constitutional rights are impaired or destroyed."

It is argued for plaintiff that this is an *ex post facto* law and therefore unconstitutional, but this can not be, for only criminal statutes which relate back and impose penalties or create new crimes are *ex post facto* in their nature, within the meaning of the Federal Constitution.

"*Ex post facto* laws differ from retroactive laws. The latter, when imposing taxes or providing for their assessment and collection, are not forbidden by the Constitution; the former, in that Constitution, has reference to criminal punishment only; Kentucky Union Co. v. Kentucky, 219 U. S. 140, 31 Sup. Ct. 171, 35 L. Ed. 137."

If, as to the manufacture of whiskey, the act imposing this excise tax is retrospective, that of itself does not invalidate it. 12 Corpus Juris, 1090, 127 Ky. 667;

120 Ky. 739. *Kentucky Union Co. v. Kentucky, supra*. The occupation taxed is that of manufacturing, storing and releasing whiskey as one complete business, and so long as any part of this operation is going on, the occupation is pursued and may be taxed.

We are not impressed with the contention that the penalties provided in the act for its violation are so excessive as to render the law invalid. The general rule is, that where a means is furnished by which a law may be tested in the courts without those subject to the penalties incurring the penalties, should the suit be decided adversely to the complaining party, penalties sufficiently heavy to effect the purposes for which the law was enacted may be imposed. *St. Louis, L. M. & S. Railway Co. v. Williams, et al.*, 40 Sup. Ct. Rep. 71; *Waddy v. Southern Railway Co.*, 235 U. S. 67, 59 L. Ed. 405; *Gulf, Colorado & Santa Fe Railway Co. v. State of Texas*, 246 U. S. 58, L. Ed. 574.

Section 162 of Kentucky Statutes provides as follows:

"When it shall appear to the Auditor that money has been paid into the treasury for taxes when no such taxes were in fact due, he shall issue his warrant on the treasury for such money so improperly paid, in behalf of the person who paid the same. Nothing herein contained shall authorize the issuing of any such warrant in favor of any person who may have made payment of the revenue tax due on any tract of land, unless it is manifest that the whole of the tax due the Commonwealth on such land has been paid, independent of the mistaken payment, and ought to be reimbursed."

In the cases of *Craig, Auditor v. Security Producing & Refining Company*, 189 Ky. 565, and *Craig, Auditor v. Frankfort Distilling Company*, decided November 23,



1920, it was held that where taxes are paid under a void or unenforceable statute, and where the payment is made directly to the Auditor or directly into the State treasury, the person paying such taxes, by applying to the Auditor within two years from the date of payment, may have such taxes refunded. Under this statute, as interpreted by this court, a means is afforded of testing the validity of the law without incurring any of the penalties provided for in the act, and without the person paying the taxes sustaining any loss. The tax may be paid, and then demand made upon the Auditor that same be refunded, and, upon the failure of the Auditor to refund, a suit may be brought against the Auditor to compel him to issue his warrant for the taxes claimed to have been wrongfully collected, and in that suit the question of the constitutionality of the statute may be determined. This would not lead to a multiplicity of suits, as the test could be made on one payment for the purpose of determining the law, and, if it should be determined in that case that the taxpayer is entitled to a refund, it would then be the duty of the Auditor to refund, not only the tax embraced in the suit, but upon proper demand he should refund any subsequent payments made under the same law, his duty to refund having been definitely settled, in the opinion in the case cited above. Aside from this, we are not prepared to say that the penalty provision of the act is an inseparable part of the act.

From the record we learn that Kentucky whiskey has been selling and removing from warehouses so actively that in the short time between the effective date of the act and the commencement of this litigation a very large amount passed to consumers. At the same rate we estimate that several million gallons of whiskey have been released from warehouses in Kentucky since the law took effect. On all this a tax of fifty cents per gallon is due, amounting to millions of dollars. As the distiller



and warehouseman passed the tax on to the consumer, and demanded and obtained in addition to the tax the same price for their goods which prevailed before the tax law was enacted, these millions of tax money now in the depositories subject to the orders of the court, belong either to the State of Kentucky as excise or to the consumers of the whiskey who paid the tax, and in no event to the distillers or warehousemen who have already received the full price of their goods, and only collected the funds now in litigation as taxes and not as a part of the price of the goods sold. It follows that neither the money nor property of the distillers or warehousemen is either taken or threatened in this litigation.

Having reached the conclusion herein announced, it necessarily follows that plaintiff's claim that its property is being taken without due process of law and without just compensation is without merit.

This injunction granted by the lower court is dissolved.

F. D. SAMPRON,  
*Judge Kentucky Court of Appeals.*

*For Plaintiff,*

HAZELRIGG & HAZELRIGG, Frankfort, Ky.

*For Defendant,*

CHAS. L. DAWSON, Frankfort, Ky."

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Supreme Court, U.

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JAMES D. MAHER,  
CLERK

50-CENT A GALLON WHISKEY TAX ACT CASE.

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1920.

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**No. 439.**

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CHARLES I. DAWSON, ATTORNEY GENERAL OF THE  
STATE OF KENTUCKY, ET AL., APPELLANTS,

vs.

KENTUCKY DISTILLERIES & WAREHOUSE CO.,  
APPELLEE.

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*Appeal from the District Court of the United States for the  
Eastern District of Kentucky.*

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**BRIEF FOR APPELLEE.**

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LEVY MAYER,  
WM. MARSHALL BULLITT,  
*Counsel for Appellee.*



# INDEX.

	Page.
<b>STATEMENT OF THE CASE</b> .....	1
<b>FIRST POINT</b> .....	5
So much of the Act as imposes a tax of fifty cents a gallon upon each gallon of whiskey transferred, in bond, from warehouses in Kentucky to any point outside of Kentucky is unconstitutional, because in conflict with the "Commerce Clause" of the Constitution.....	5
<i>Passenger Cases</i> , 7 How., 283.....	7
<i>Almy vs. California</i> , 24 How., 169.....	7
<i>Crandall vs. Nevada</i> , 6 Wall., 35.....	7
<i>Woodruff vs. Parham</i> , 8 Wall., 123.....	7
<i>Case of State Freight Tax</i> , 15 Wall., 232....	7
<i>Henderson vs. Mayor</i> , 92 U. S., 259.....	7
<i>Telegraph Co. vs. Texas</i> , 105 U. S., 460....	8
<i>People vs. Compagnie Gen. Transatlantique</i> , 107 U. S., 59.....	7
<i>Pickard vs. Pullman Southern Car Co.</i> , 117 U. S., 34.....	10
<i>Oklahoma vs. Kansas Nat. Gas Co.</i> , 221 U. S., 229.....	10
<i>Heyman vs. Hays</i> , 236 U. S., 178.....	13
<i>U. S. vs. Hvoslef</i> , 237 U. S., 1.....	19
Cases Distinguished.....	15
<i>Coe vs. Errol</i> , 116 U. S., 517.....	15
<i>Diamond Match Co. vs. Ontonagon</i> , 188 U. S., 82.....	15
<i>American Mfg. Co. vs. St. Louis</i> , 250 U. S., 459.....	17
<b>SECOND POINT</b> .....	20
The provision for imposing a tax on whiskey transferred, in bond, out of the State is an inseparable part of the statute, and, being invalid, renders the entire Act void.....	20

	Page.
6 R. C. L., Sec. 122.....	20
<i>State vs. O'Connor</i> , 5 N. D., 629.....	21
<i>Pollock vs. Farmers Loan &amp; Trust Co.</i> , 158 U. S., 601, 635.....	22
<b>THIRD POINT</b> .....	24
<b>The Act is unconstitutional because it is, in fact, a property tax, and as such, it is in violation of the Kentucky constitution, §171</b> .....	24
<i>Campbell County vs. City of Newport</i> , 174 Ky., 712, 723.....	25
<i>Raydure vs. Board of Supervisors</i> , 183 Ky., 84, 96.....	26
<b>FOURTH POINT</b> .....	28
<b>The Act is unconstitutional because it is not such a license tax, special or excise tax, as is author- ized by the Kentucky Constitution §181</b> .....	28
<i>Pollock vs. Farmers Loan &amp; Trust Co.</i> , 157 U. S., 429; 158 U. S., 601.....	32
<i>Knoultton vs. Moore</i> , 178 U. S., 41.....	32
<i>Flint vs. Stone Tracy Co.</i> , 220 U. S., 107..	32
<i>Zonne vs. Minneapolis Syndicate</i> , 220 U. S., 187.....	32
<i>McCoach vs. Minchill Railway Co.</i> , 228 U. S., 295.....	32
<b>FIFTH POINT</b> .....	34
<b>The Kentucky Co. properly resorted to equity as there is no adequate remedy at law</b> .....	34
1. The Kentucky Courts recognize that the proper procedure is by injunction, be- cause there is no adequate remedy at law.....	35
<i>Craig vs. Security Prod. &amp; Ref. Co.</i> , 189 Ky., 565.....	35
<i>Gates vs. Barrett</i> , 79 Ky., 295.....	35

# INDEX.

iii

	Page.
<i>Negley vs. Henderson Bridge Co.</i> , 107 Ky., 414.....	35
<i>Mt. Sterling Oil &amp; Gas Co. vs. Ratliff</i> , 127 Ky., 1.....	35
<i>Bank of Kentucky vs. Stone</i> , 88 Fed., 383; 174 U. S., 799.....	35
2. Reasons for inadequacy of remedy at law.....	36
(a) Multiplicity of suits.....	36
(b) Loss of interest.....	36
(c) Treasurer not bound by Auditor's actions.....	37
<i>Rhea, Treasurer, vs. Newman</i> , 153 Ky., 604.....	37
(d) Prior appropriation essential.....	37
(e) Delay in payment by Treasurer.....	37
(f) Warrants if issued probably void.....	39
<i>Stanley vs. Townsend</i> , 179 Ky., 833.....	39
(g) Taxes go to the counties rather than to the State.....	39
<i>Mitchell vs. Knox Co., Fiscal Court</i> , 165 Ky., 543.....	39

## LIST OF AUTHORITIES

<i>Almy vs. California</i> , 24 How., 169.....	7
<i>American Mfg. Co. vs. St. Louis</i> , 250 U. S., 459.....	17
<i>Bank of Kentucky vs. Stone</i> , 88 Fed., 383; 174 U. S., 799.....	35
<i>Case of State Freight Tax</i> , 15 Wall., 232.....	7
<i>Coc vs. Errol</i> , 116 U. S., 517.....	15
<i>Grandall vs. Nevada</i> , 6 Wall., 35.....	7
<i>Craig vs. Security Prod. &amp; Refining Co.</i> , 189 Ky., 565.....	35
<i>Diamond Match Co. vs. Ontonagon</i> , 188 U. S., 82.....	15
<i>Flint vs. Stone Tracy</i> , 220 U. S., 107.....	32
<i>Gates vs. Barrett</i> , 79 Ky., 295.....	35
<i>Henderson vs. Mayor</i> , 92 U. S., 259.....	7
<i>Heyman vs. Hays</i> , 236 U. S., 178.....	13
<i>Knowlton vs. Moore</i> , 178 U. S., 41.....	32
<i>McCoach vs. Minchill Ry. Co.</i> , 228 U. S., 295.....	32

	Page.
<i>Mt. Sterling Oil Co. vs. Ratliff</i> , 127 Ky. 1.....	35
<i>Mitchell vs. Knox County Fiscal Court</i> , 165 Ky., 543.....	39
<i>Negley vs. Henderson Bridge Co.</i> , 107 Ky., 414.....	35
<i>Oklahoma vs. Kansas Nat. Gas Co.</i> , 221 U. S., 229....	10
<i>Passenger Cases</i> , 7 How., 283.....	7
<i>People vs. Compagnie Gen. Trans.</i> , 107 U. S., 59....	7
<i>Pickard vs. Pullman Southern Car Co.</i> , 117 U. S., 34.....	10
<i>Pollock vs. Farmers Loan &amp; Trust Co.</i> , 157 U. S., 429; 158 U. S., 601.....	32
<i>Rhea, Treas., vs. Newman</i> , 153 Ky., 604.....	37
<i>Stanley vs. Townsend</i> , 179 Ky., 833.....	39
<i>State vs. O'Connor</i> , 5 N. D., 629.....	21
<i>Telegraph Co. vs. Texas</i> , 105 U. S., 460.....	8
<i>U. S. vs. Hvoslef</i> , 237 U. S., 1.....	19
<i>Woodruff vs. Parham</i> , 8 Wall., 123.....	7
<i>Zonne vs. Minneapolis Syndicate</i> , 220 U. S., 187....	32

**50-CENT A GALLON WHISKEY TAX ACT CASE.**

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IN THE

**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1920.**

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**No. 439.**

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**CHARLES I. DAWSON, ATTORNEY GENERAL OF THE  
STATE OF KENTUCKY, ET AL., APPELLANTS,**

**vs.**

**KENTUCKY DISTILLERIES & WAREHOUSE CO.,  
APPELLEE.**

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*Appeal from the District Court of the United States for the  
Eastern District of Kentucky.*

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**BRIEF FOR APPELLEE.**

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**Statement of the Case.**

This appeal involves the validity, under both the Federal and State Constitutions, of an act of the Kentucky Legislature approved March 12, 1920, known as the "50-cent a Gallon Tax Act," which imposed a so-called license or occupation tax of 50 cents per gallon on every gallon of the approximately 30,000,000 gallons of whiskey then in bonded warehouses in Kentucky, which should thereafter be—



(1) Tax-paid and withdrawn from bond, or

(2) Transferred in bond *from Kentucky to any point outside the State.*

For many years prior to March 12, 1920, the Kentucky Distilleries & Warehouse Co. (hereafter called the Kentucky Co.) had owned and operated various United States bonded warehouses in Kentucky, in which, on that date, were stored large quantities of whiskey that the Kentucky Co. had manufactured more than five years previously, to wit (R., 4-7):

(1) 250,000 gallons owned by the Kentucky Co.

(2) 8,000,000 gallons owned by various people throughout the United States, who held the Kentucky Co.'s warehouse receipts therefor.

From day to day large quantities of whiskey, both its own and that of its customers, (1) were being shipped, *in bond*, from Kentucky to other States in the course of interstate commerce; or (2) were being tax-paid and removed *from bond* in Kentucky (R., 7-9)—all for non-beverage purposes. The laws of the United States expressly provide for the transfer of whiskey, in bond, from one warehouse to another warehouse in the same State, *or in other States*, or for export.

So far as is relevant to this appeal, the following is

### **The Proper Construction of the Act.\***

The Act provides (R., 14-17):

1. That every whiskey warehouseman shall pay a tax of 50 cents on every gallon of whiskey that is (a) withdrawn from bond, or (b) *transferred, under bond, from Kentucky to any place outside the State* (§1, 3).

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\* Although the act is easily susceptible of a construction that would render it clearly void, yet in view of the principle that every reasonable construction of a statute must be resorted to (even

II. That the warehouseman shall make monthly reports to the State Auditor of the number of gallons so withdrawn from bond or transferred, in bond, to points outside the State; and shall simultaneously pay to the auditor 50 cents on each gallon so withdrawn or transferred, whether owned by the warehouseman or not (§2, 3); and that, to secure the payment of such tax, the State shall have a lien on the warehouse and on all other whiskey (whether belonging to the warehouseman or to his customers) stored therein (§3).<sup>†</sup>

III. That the warehouseman shall pay a fine of from \$500 to \$1,000 for each day's default in filing the report or in paying the tax (§5).

The Kentucky Co. filed this suit in the Federal court to enjoin the proper State officials (who were charged with the duty of enforcing the Act and of prosecuting those persons who failed to pay the taxes imposed thereby) (1) from indicting or otherwise attempting to prosecute or collect from the Kentucky Co. the penalties prescribed by the Act, and (2) from enforcing the lien for the taxes against the Kentucky Co.'s property (R., 9-12).

The bill alleged that the Kentucky Co. was a warehouseman, owning in its own name and having on storage for others large amounts of whiskey, which were stored in its bonded warehouses in Kentucky; that since March 12, 1920,

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though such construction be not the most natural or obvious one; in order to save it from unconstitutionality, we are disposed (in the absence of any decision by the State court) to accede to the construction urged by the Attorney General (Brief, pp. 37-39), that the tax is not literally an "annual" tax of 50 cents per gallon per year, but is merely a single tax of 50 cents on each gallon that is: (a) withdrawn from bond in Kentucky, or (b) transported in bond from Kentucky to another State.

<sup>†</sup>The warehouseman must primarily pay the tax on whiskey so withdrawn or transferred outside the State; but where the whiskey belongs to third parties the warehouseman is subrogated to the State's lien to secure reimbursement from the owners for the taxes so paid.

it had already withdrawn from bond and transferred, in bond, from Kentucky to points outside Kentucky (and was daily continuing so to do), large quantities of whiskey; that the defendants were insisting on the filing of the report and the payment of the taxes under the Act and were about (1) to prosecute the Kentucky Co. for its failure to do so, and (2) to enforce against the Kentucky Co.'s property the alleged lien for the taxes.

On a motion for an interlocutory injunction, heard before three judges (Judicial Code, §266), the injunction was granted (R., 84-86), and an elaborate opinion in a companion suit (*Freiburg case*) was filed and adopted in this case, except as to one point not here involved (R., 52-83).

#### SUMMARY OF POINTS DISCUSSED.

1. So much of the Act as imposes a tax of 50 cents a gallon upon each gallon of whisky transferred, in bond, from warehouses in Kentucky to any point outside of Kentucky, is unconstitutional, because in conflict with the Commerce Clause" of the Constitution.

2. The provision for imposing a tax on whisky transferred, in bond, out of the State is an inseparable part of the statute, and being invalid, renders the entire Act void.

3. (Here insert third point.)

4. The Act is unconstitutional because it is not such a license tax special or excise tax as is authorized by the Kentucky Constitution § 181.

5. The Kentucky Co. properly resorted to equity, as there is no adequate remedy at law.

# FIRST POINT.

So much of the Act as imposes a tax of 50 cents a gallon upon each gallon of whiskey transferred in bond from warehouses in Kentucky to any point outside of Kentucky is unconstitutional, because in conflict with the "Commerce Clause" of the Constitution.

The Act provides that every person engaged in the business of owning and storing whiskey "in bonded warehouses in this State" shall pay a tax of

"fifty cents on every proof gallon of said distilled spirits \* \* \* withdrawn from a bonded warehouse or transferred therefrom under bond out of the Commonwealth of Kentucky" (§1, R., 14).

And (§3, R., 15):

"Shall \* \* \* pay [monthly] to the Auditor of Public Accounts the tax of fifty cents per proof gallon upon each proof gallon of such spirits \* \* \* transferred under bond out of this State."

Under the United States internal revenue laws, there are two kinds of bonded warehouses, to wit, "distillery bonded warehouses" and "general bonded warehouses."

By those laws whiskey may be transferred "under bond"

"1. From distillery warehouses to general bonded warehouses located in the same or in another district.

"2. From one general bonded warehouse to another general bonded warehouse in the same or in another district" (act August 28, 1894, §§51-55; 28 Stat., 509, 565; Regulation No. 20, pp. 15-26).

3. From distillery warehouses to foreign countries—exported (R. S., 3330 as amended; 4 Fed. Stat., App., 82; U. S. Comp. Stat. 1916, §6125; Regulation No. 29, revised).

The Commissioner of Internal Revenue has prescribed elaborate regulations (with the force of law) covering the bonds, procedure, etc., in those respective cases (*id.*).

The present Act of the Kentucky Legislature (as construed by the State authorities) does not impose any tax whatever on whiskey, no matter how freely transferred in bond from one point in Kentucky to another point in Kentucky, whether from a distillery warehouse to a general bonded warehouse or from one general bonded warehouse to another.\* But it imposes the 50-cent tax on whiskey which is transferred in bond from a distillery or general bonded warehouse in Kentucky to (a) some general bonded warehouse *outside* of Kentucky, or (b) some *foreign country*.

No matter by what name it is called, nor for what alleged purpose it was passed, the Act imposes a direct tax of 50 cents on every gallon of whiskey which is transported, in bond, from Kentucky to any point *outside* of Kentucky.

Without dwelling upon the proposition that when Congress, under its power of taxation and to regulate commerce, has prescribed the detailed terms and conditions under which whiskey may be transferred, in bond, from Kentucky to points outside, such action is equivalent to a declaration that such transportation shall be free of State interference and taxation, we come directly to the fundamental proposition that, while a State may tax all property within its limits *as property*, even though it be transported to another State, yet it cannot make the imposition of the tax *dependent* upon the transportation of the property to another State.

There are so many authorities directly in point that it is not necessary to rest upon, or to seek analogies in, those countless cases where it has been held that State statutes were in conflict with the "commerce clause" because they operated as a burden upon, or to interfere with, the freedom

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\*The ATTORNEY GENERAL concedes this in his Brief, p. 41, saying: "It is only when the liquor is *removed from bond*, or transferred under bond *out of the State* that the tax becomes due."

of interstate commerce, on account of taxes upon receipts, or capital stock, or license fees, etc.

In the *Passenger Cases*, 7 How., 283, and *Crandall vs. Nevada*, 6 Wall., 35, as subsequently extended in *Case of State Freight Tax*, 15 Wall., 232, at page 281; *Henderson vs. Mayor*, 92 U. S., 259, and *People vs. Compagnie Gen. Transatlantique*, 107 U. S., 59, it has been finally settled that a State cannot impose a tax on a person coming into or passing out of a State, for the reason that the passage of persons between the States is interstate commerce, and that a tax on a person so moving is in conflict with the Federal Constitution. (See also *People vs. Pacific Mail*, 16 Fed., 344.)

The same rule applies to commodities.

In *Almy vs. California*, 24 How., 169, as explained in *Woodruff vs. Parham*, 8 Wall., 123, 138, it was held that a stamp tax on bills of lading for the transportation of gold or silver from points within California to any point without the State was unconstitutional, because it was in effect a tax upon the gold or silver so transported.

In *Case of the State Freight Tax*, 15 Wall., 232, a Pennsylvania statute required each railroad to make a quarterly report of the amount of freight carried, and to pay from 2 to 5 cents (according to the commodity) on every ton of freight carried by it. The statute was held unconstitutional as applied to freight carried from within the State to points out of it, or carried from without the State into it, because in violation of the commerce clause. It was a tax directly upon each *ton* of freight carried, just as in the case at bar it is a tax upon every *gallon* of whiskey carried in bond from the State to a point outside of it.

This court said that it was a tax *upon* freight carried between the States, a tax *because* of its transportation, a regulation of interstate commerce, and void because (pp. 279, 281)—

“No State can impose a tax upon *freight* transported from State to State, or upon the transporter, *because* of such transportation.”

It was also pointed out (pp. 276, 277) that the statute was not saved from unconstitutionality because the State imposed a similar tax on freight moving only in *intrastate* commerce. *A fortiori*, the Kentucky statute is bad because it *exempts* from taxation whiskey transported in bond from one warehouse to another *within* the State, but *imposes a tax* upon a similar transportation from a warehouse within the State to another *without* the State.

In *Telegraph Co. vs. Texas*, 105 U. S., 460, a Texas statute imposed an occupation tax of one cent for every full-rate message sent, and one-half cent for every message less than full rate. It was in no sense a tax on receipts nor on capital stock, but it was a flat tax of a specified sum on every message sent, whether it was long or short, whether going five miles or a thousand miles. The telegraph company sent from its Texas offices a great many messages, of varying lengths and to varying distances, many of which went to places outside of the State.

This court held the tax invalid as to messages sent from Texas to points outside of the State, saying (p. 465):

“\* \* \* it may undoubtedly be taxed in a proper way on account of its *occupation* and its business. The precise question now presented is whether the power to *tax its occupation* can be exercised by placing a *specific tax on each message sent out of the State*. \* \* \*

“In *Case of the State Freight Tax* (15 Wall., 232) this court decided that a law of Pennsylvania requiring transportation companies doing business in that State to pay a fixed sum as a tax ‘on each two thousand pounds of freight carried,’ without regard to the distance moved or charge made, was unconstitutional, so far as it related to goods taken through the State, or from points without the State to points within, or from points within to points without, because to that extent it was a regulation of foreign and interstate commerce. In this the court but applied the rule, announced in *Brown vs. Maryland* (12 Wheat., 419),

that where the burden of a tax falls on a *thing* which is the subject of taxation, the tax is to be considered as laid on the thing rather than on him who is charged with the duty of paying it into the treasury. In that case it was said a tax on the sale of an article imported only for sale was a tax on the article itself. To the same general effect are *Welton vs. State of Missouri*, 91 U. S., 275; *Cook vs. Pennsylvania*, 97 *id.*, 566; and *Webber vs. Virginia*, 103 *id.*, 344. Taxes upon passenger carriers of a specific amount for each passenger carried were held to be taxes on the passengers in *Passenger Cases*, 7 How., 283; *Crandall vs. State of Nevada*, 6 Wall., 35, and *Henderson vs. The Mayor*, 92 U. S., 259. Taxes on vessels according to measurements, without any reference to value, were declared to be taxes on tonnage. *State Tonnage Cases*, 12 Wall., 204; *Peele vs. Morgan*, 19 *id.*, 581; *Cannon vs. New Orleans*, 20 *id.*, 577, and *Inman Steamship Co. vs. Tinker*, 94 U. S., 238.

"The present case, as it seems to us, comes within this principle. The tax is the same on every message sent, and *because* it is sent, without regard to the distance carried or the price charged. It is in no respect proportioned according to the business done. If the message is sent, the tax must be paid, and the amount determined solely by the class to which it belongs. If it is full rate, the tax is one cent, and if less than full rate, one-half cent. Clearly, if a fixed tax for every two thousand pounds of freight carried is a tax on the freight, or for every measured ton of a vessel a tax on tonnage, or for every passenger carried, a tax on the passenger, or for the sale of goods, a tax on the goods, this must be a tax on the messages. As such, so far as it operates on private messages sent out of the State, it is a regulation of foreign and interstate commerce and beyond the power of the State. That is fully established by the cases already cited."

That is a controlling authority.

In the case at bar the tax is 50 cents on every gallon of whiskey (regardless of value, age, or distance) sent, in bond, out of the State.



In *Pickard vs. Pullman Southern Car. Co.*, 117 U. S., 34, Tennessee imposed a privilege tax of \$50 on each sleeping car owned by a Kentucky corporation, which car was run by another corporation over its railroad in Tennessee. It was held that the tax was void with respect to the cars which were used to run in and out of the State. The opinion cites and reviews many prior authorities. This was followed in *Allen vs. Pullman Co.*, 191 U. S., 171.

Indeed, the law has become so well settled that a State cannot impose on any article a tax which attaches upon or because of the transfer of the article from or into a State that the State legislatures have generally abandoned the attempt; and it is something of a curiosity here to see a revival of that long-discredited theory.

In *Oklahoma vs. Kansas Nat. Gas. Co.*, 221 U. S., 229, 255, an Oklahoma statute which, under the guise of purporting to govern domestic corporations and to prescribe the conditions under which foreign corporations might be admitted to the State, prohibited them from transporting natural gas from Oklahoma into other States, was held unconstitutional, as in violation of the commerce clause. The court said:

"Gas, when reduced to possession, is a commodity; it belongs to the owner of the land, and, when reduced to possession, is his individual property, subject to sale by him, and may be a subject of intrastate commerce and interstate commerce. The state of Oklahoma recognizes it to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation. In other words, the purpose of its conservation is in a sense commercial—the business welfare of the State, as coal might be, or timber. Both of those products may be limited in amount, and the same consideration of the public welfare which would confine gas to the use of the inhabitants of a State would confine them to the inhabitants of the State. If the States have such power a singular situation might result. Pennsylvania might keep its coal, the

Northwest its timber, the mining States their minerals. And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequences does such power tend? If one State has it, all States have it; embargo may be retaliated by embargo, and commerce will be haled at State lines. And yet we have said that 'in matters of foreign and interstate commerce there are no State lines.' In such commerce, instead of the States, a new power appears and a new welfare, a welfare which transcends that of any State. But rather let us say it is constituted of the welfare of all of the States, and that of each State is made the greater by a division of its resources, natural and created, with every other State, and those of every other State with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States. If there is to be a turning backward, it must be done by the authority of another instrumentality than a court."

If a State cannot prohibit its products from being carried by the owner into another State, neither can it accomplish the same result indirectly by taxing (to the point of prohibition) a product carried from one State to another, because if the State has a right to impose a 50-cent tax on each gallon of whiskey transported, in bond, from Kentucky to other States, it may make the tax as high as it pleases; for, once conceding the power to tax, the extent to which the power shall be exercised, is a matter for the legislature and not the courts.

The *Oklahoma Gas Case* is pertinent in another aspect. The statute, while permitting the transportation of natural gas over the highways *within* the State, denied the use of the highways to corporations desiring to transport the natural gas to points *outside* of the State.

The court said (p. 262):

"We place our decision on the character and purpose of the Oklahoma statute. The State, as we have seen, grants the use of the highways to domestic corporations engaged in intrastate transportation of natural gas, giving such corporations even the right to the longitudinal use of the highways. It denies to appellees the lesser right to pass under them or over them, notwithstanding it is conceded in the pleadings that the greater use given to domestic corporations is no obstruction to them. This discrimination is beyond the power of the State to make. As said by the Circuit Court of Appeals for the Eighth Circuit, no State can by action or inaction prevent, unreasonably burden, discriminate against or directly regulate interstate commerce or the right to carry it on. And in all of these inhibited particulars the statute of Oklahoma offends."

In the case at bar, the Act permits any one to transport whiskey, in bond, freely, without the payment of any tax, from a point within Kentucky to another point *within* Kentucky; but the moment whiskey is transported, in bond, from a point in Kentucky to a point *outside* of Kentucky, the warehousemen must pay 50 cents a gallon tax. If that is not a direct tax on interstate commerce, the English language has lost its meaning.

In support of his contention that the tax is *not* upon the whiskey transported in commerce, but is a mere occupation or license tax upon "the business of owning and storing the whiskey in bonded warehouses as a separate business," the ATTORNEY GENERAL says (Brief, pp. 42, 43):

"Persons who store liquor in bonded warehouses do so for a certain definite purpose. One is to permit it to age, so that it may be bottled in bond and then sold to the trade. To do this, under Government regulations, it must remain in storage and age for four years. This is undoubtedly doing something *which is a necessary part of the business of manufacturing*

and selling liquor. Another purpose in storing liquor in a bonded warehouse is that which animates all persons who store in a public warehouse, viz., to have some person in charge and in keeping of the goods and responsible therefor. Another reason for the storage is to avoid payment of Government taxes until a sale has been secured for the product stored. It would seem that a person engaged in the liquor business to any extent would undoubtedly have to engage in these particular acts in order to so engage in business."

That contention was made, considered, and adversely disposed of in *Heyman vs. Hays*, 236 U. S., 178, where a privilege tax for carrying on a wholesale liquor mail-order business in Tennessee with persons in other States was held to be invalid. The Tennessee State court had upheld the tax upon the ground that it was imposed, not upon the interstate business, but upon the privilege of doing business in Tennessee, the nature of which was thus summarized in the opinion of the Supreme Court (p. 185):

"(1) The existence of the goods in the State, held in a warehouse as stock susceptible of being sold in the State if there was a desire to do so and ready to be shipped in the channels of interstate; (2) The care and attention, for the purpose of packing or otherwise, which must be given to the goods situated in the State to enable the interstate commerce shipment to be made; (3) The receipt in the State from other States of the orders; (4) The clerical force or assistance which was required in the State to keep an account of the shipments as made to other States, and the supervision in Tennessee which was required to conduct the exclusive business of shipping into other States and of receiving the price resulting from such shipments."

This court rejected that contention (almost identical with the ATTORNEY GENERAL's claim here) and held the tax void, saying (p. 186):

"\* \* \* they were but the performance of acts accessory to and inhering in the right to make the interstate commerce shipments, and therefore to admit the power because of their existence to burden the right to ship in interstate commerce would necessarily be to recognize the authority to directly burden such right. In the nature of things, the protection against the imposition of direct burdens upon the right to do interstate commerce, as often pointed out by this court, is not a mere abstraction affording no real protection, but is practical and substantial and embraces those acts which are necessary to the complete enjoyment of the right protected. \* \* \*

"Some cases are pressed in argument as upholding the privilege tax in question under the circumstances here disclosed, but they are inapposite. We do not stop to review them in order to sustain this appreciation of the cases relied on, since, in our opinion in the nature of things, its accuracy is demonstrated by a mere statement of the proposition to which all the contentions here urged are in their essence reducible, which is as follows: Although the shipment of merchandise from one State to another is interstate commerce, which the States cannot directly burden, nevertheless the States may directly burden such shipments in every case where there is any merchandise kept in the State to be the subject of interstate commerce shipment, or *when any of those steps which are essentially prerequisite to the initiation of an interstate commerce shipment are taken by the owner of the merchandise.*"

The mere ownership and storage of whiskey in bonded warehouses in Kentucky with such necessary care, attention, packing, etc., as may be necessary to enable the whiskey to be transported in bond from Kentucky to other States, cannot constitute the exercise of any privilege which the State can tax, when the tax is only levied upon the whiskey transported, in bond, from Kentucky to other States.

At the risk of repetition, it must be emphasized that *no tax* is imposed upon whiskey which is transported, in bond,

from one point in Kentucky to another point in Kentucky, nor so long as the whiskey remains in bond—in either of which instances the reasons of the ATTORNEY GENERAL apply equally as in the case of whiskey transferred, in bond, to a point outside the State. It is only taxed (1) when it is removed from bond, or, (2) on the point now being considered, when it is transported, under bond, in *interstate* commerce from Kentucky to some other point outside of the State.

The argument of the ATTORNEY GENERAL is precisely that which was *rejected* in *Heyman vs. Hays*, namely, that Kentucky may tax whiskey which is to be transported in bond to another State—

“when any of those steps which are essentially prerequisite to the initiation of an interstate commerce shipment are taken by the owner of the merchandise” (236 U. S., 188).

The very essence of an *interstate commerce* shipment of the whiskey was that it should be “transferred under bond out of this State,” and yet the act provides that the tax must be paid on each gallon “transferred under bond out of this State.”

The ATTORNEY GENERAL contends that if the lower court is correct in holding the tax to be “really a *property*, and not an excise, *tax*” (R., 52), then it is at least free from the constitutional objection of being a burden upon interstate commerce, citing *Coe vs. Errol*, 116 U. S., 517, and *Diamond Match Co. vs. Ontonagon*, 188 U. S., 82, on the ground that the whiskey was manufactured in Kentucky and “was and is a part of the general mass of taxable property of the State”; and that—

“the right of the State to tax it continues unimpaired until it starts on its ultimate journey in interstate commerce, or until it is delivered to and received by a common carrier for movement in interstate commerce” (Brief, p. 55).

In *Coe vs. Errol and Diamond Match Co. vs. Ontonagon*, logs which were cut in the taxing State were in each instance held in rivers, awaiting a convenient or profitable time for shipping them into other States for sale. They were taxed, upon the ground that, although *intended* to be sent out of the State, they had not yet *ceased* to be a part of the general mass of taxable property.

The difference between those cases and the case at bar is obvious, because in the latter the tax was *not* imposed on the whiskey as a part of the general mass of taxable property in Kentucky, but it actually remained *untaxed until*, and the tax was only imposed *when*, and on account of, its transfer out of the State.

As long as the whiskey remains in bond in Kentucky, it is *tax free*, but when it is transferred *out* of the State, *eo instanti* it is taxed, *because* of such transfer. That is a plain tax on interstate commerce.

That the act does not tax the whiskey itself, but only its transportation in interstate commerce, is emphasized by the ATTORNEY GENERAL, who said (Brief, p. 58) :

"We do not want the court to lose sight of the proposition that the law in question *does not tax* the whiskey produced in Kentucky or stored in Kentucky."

He contends that the tax is a mere license for the privilege of engaging in the business of owning and storing the whiskey in warehouses, and that (Brief, p. 59) —

"the law does not tax the act of transferring whiskey in bond out of Kentucky, but it simply requires the payment of the license tax before the removal of the whiskey from the jurisdiction of the State."

A flat tax on property for the alleged privilege of owning it and keeping it in storage, as required by the internal-revenue laws, is obviously nothing but a *property tax*, and

is *not* a license or occupation tax. To say that a tax imposed upon each gallon of whiskey that *is* transferred out of the State

"does not tax the act of *transferring* whiskey in bond out of Kentucky,"

but simply

"requires the payment of the license tax *before* the removal of the whiskey from the jurisdiction of the State"

is a distinction without a difference.

You cannot tax whiskey only when it is transferred *out* of the State, and then, truly, say that such a tax is the mere payment of a license for the privilege of keeping it *in* the State!

The ATTORNEY GENERAL's contention amounts to this contradiction in reasoning:

The so-called license tax is for the privilege of owning and storing the whiskey *in* Kentucky, but as long as such privilege is exercised by owning and storing the whiskey *in* Kentucky, *no tax* need be paid or ever paid therefor; but the instant the whiskey is carried *out* of Kentucky—and *ipso facto* the alleged occupation of owning and storing it *in* Kentucky ceases—then, for the first time, the tax *comes* into being!

The ATTORNEY GENERAL relies on *American Mfg. Co. vs. St. Louis*, 250 U. S., 459, in which an ordinance was upheld which imposed, as a license tax for the privilege of conducting a manufacturing business in the city of St. Louis, a charge of one-tenth of 1 per cent of the sales of all goods manufactured in St. Louis, regardless of where sold, although the actual payment of the tax was postponed until the goods should be sold. Many of the goods were sold outside of Missouri. The basis of the decision was that the city



might charge, as a license tax on a manufacturing concern, a percentage of all goods there manufactured, whether sold or not; and the fact that the tax was limited to a percentage of the goods there manufactured and subsequently sold did not impose a burden on interstate commerce.

A license tax of a certain percentage on all whiskey manufactured in Kentucky, or manufactured in Kentucky and subsequently sold (whether in the State or outside of it), might be sustained under the *American Mfg. Co. Case*; but that is a very different thing from imposing a tax, not on the manufacturer, but upon the owner for every gallon which is transferred out of the State—so that the transfer out of the State, to wit, *interstate commerce*, is the very act which causes the tax to attach.

In the case at bar the tax was not imposed upon the property while at rest in Kentucky, nor even while it was in the process of being transported through Kentucky on its interstate journey (*Kelley vs. Rhoads*, 188 U. S., 1), but the tax only became effective when the interstate journey had actually been completed by the transfer of the whiskey across the State line.

The difference between the case at bar, on the one hand, and *Coe vs. Errol*, the *Diamond Match Co. Case*, and *American Mfg. Co. vs. St. Louis* is that in the three latter cases the tax was imposed, in two of them, as a property tax upon the logs while still a part of the mass of taxable property, and in the other instance the license tax was levied upon the goods manufactured under the license and subsequently sold (the fact that they were sold in part outside of the State being merely incidental), while in the case at bar it was solely the transportation in interstate commerce which brought the incidence of the tax into effect.

The invalidity of the tax may be illustrated by a case where the imposition of the tax was not so obviously upon the article shipped, as it is here.

In *United States vs. Hooolef*, 237 U. S., 1, it was held that the war stamp tax upon charter-parties for the carriage of cargo from a State to a foreign port was invalid because in violation of the constitutional prohibition against laying any tax on articles exported from any State.

It was pointed out that the United States and the States were equally forbidden to tax exports, and that there was also a direct analogy to the commerce clause protecting interstate commerce from State legislation imposing direct burdens.

The court said (p. 13):

"The prohibition \* \* \* is designed to give immunity from taxation to property that is in the actual course of such exportation (*Pace vs. Burgess*, 92 U. S., 372; *Turpin vs. Burgess*, 117 U. S., 504; *Cornell vs. Coyne*, 192 U. S., 418). This constitutional freedom, however, plainly involves more than mere exemption from taxes or duties which are laid specifically upon the goods themselves."

In the case at bar, however, the tax is laid specifically upon the whiskey itself.

The present contention of the ATTORNEY GENERAL, that the tax in question is not a tax upon articles transported in commerce, but is a mere tax on the occupation of owning and storing the whiskey to be measured by the amount transported in commerce, was aptly anticipated and answered by CHIEF JUSTICE MARSHALL in *Brown vs. Maryland*, 12 Wheat., 419, quoted in the *Hooolef Case*, as follows (p. 14):

"The United States have the same right to tax occupations which is possessed by the States. Now, suppose the United States should require every exporter to take out a license, for which he should pay such tax as Congress might think proper to impose, would the Government be permitted to shield itself from the just censure to which this attempt to evade the prohibitions of the Constitution would expose it by say-

ing that this was a tax on the person, not on the article, and that the legislature had a right to tax occupations?"

## SECOND POINT.

**The provision for imposing a tax on whiskey transferred, in bond, out of the State is an inseparable part of the Statute, and, being invalid, renders the entire Act void.**

For the supposed privilege of "owning and storing whiskey" in Kentucky, the Act imposes two classes of taxes:

(a) Fifty cents a gallon on the whiskey which is tax-paid and removed from bond and becomes a part of the mass of taxable property in Kentucky; and

(b) Fifty cents a gallon on the whiskey transported in bond out of the State.

The latter being, as we have seen, invalid, can it be presumed that the Legislature would have imposed 50 cents a gallon privilege tax on the whiskey, which, being removed from bond, became available for use in the State, when at the same time whiskey (enjoying the same privilege of being owned and stored) which is shipped, in bond, out of the State is *exempted* from such tax? Is it conceivable that the Legislature would have been willing to pass the statute taxing the one without the other?

As the Act attempted to reach all the whiskey in bond in Kentucky, will not the entire Act fall when a large portion of the whiskey sought to be taxed will entirely escape taxation through the invalidity of that portion of the law? The rule is thus aptly stated in 6 R. C. L., §122:

"The question as to whether portions of a statute which are constitutional shall be upheld, while other divisible portions are eliminated as unconstitutional is primarily one of intention.

"If the objectionable parts of a statute are severable from the rest in such a way that the Legislature would be presumed to have enacted the valid portion without the invalid, the failure of the latter will not necessarily render the entire statute invalid, but the statute may be enforced as to those portions of it which are constitutional.

"If, however, the constitutional and the unconstitutional portions are so dependent on each other as to warrant the belief that the legislature intended them to take effect in their entirety, it follows that if the whole cannot be carried into effect, it will be presumed that the Legislature would not have passed the residue independently, and accordingly the entire statute is invalid.

"This is simply another way of stating the familiar rule, that if the parts of a law are divisible, and some of them are constitutional and others not, the constitutional provisions cannot be held valid if it appears that they would not have been adopted without the other parts."

The Legislature of Kentucky cannot be presumed to have intended to pass a discriminatory tax which would operate *against* the whiskey remaining *in* the State and *in favor* of the whiskey shipped *out* of the State.

In *State vs. O'Connor*, 5 N. D., 629, an Act of North Dakota attempted to tax all persons engaged in the business of offering merchandise for sale. It was held that, so far as the act attempted to tax persons engaged in the business of selling, by sample, in North Dakota, goods to be shipped into North Dakota from another State to fill the orders so obtained, it was void, as an unlawful interference with interstate commerce, under the authority of *Brennan vs. Titusville*, 153 U. S., 289, and others.

In holding that the failure of the act to stand as to such persons, necessarily caused it to fail entirely, on the ground that the legislature could not have intended to discriminate

against local business enterprises in favor of foreign enterprises, the court said :

“When the Legislature have declared in the most emphatic manner that these persons shall be included in the law, and that it is on that condition that the act is passed, it would be equivalent to creating a new statute by judicial decision for us to hold that it would nevertheless stand as to its other provisions after it had been adjudged void as to such persons,—a new statute, discriminating against the business interests of the State.”

This court announced the same principle in *Pollock vs. Farmers Loan & Trust Co.*, 158 U. S., 601, 635, where CHIEF JUSTICE FULLER said :

“Being of opinion that so much of the sections of this law as lays a tax on income from real and personal property is invalid, we are brought to the question of the effect of that conclusion upon these sections as a whole.

“It is elementary that the same statute may be in part constitutional and in part unconstitutional, and, if the parts are wholly independent of each other, that which is constitutional may stand, while that which is unconstitutional will be rejected. And in the case before us there is no question as to the validity of this act, except sections twenty-seven to thirty-seven, inclusive, which relate to the subject which has been under discussion; and, as to them, we think the rule laid down by Chief Justice Shaw in *Warren vs. Charlestown*, 2 Gray, 84, is applicable, that ‘if the different parts are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant a belief that the Legislature intended them as a whole, and that if all could not be carried into effect the Legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected must fall with them;’ or, as the point is put by Mr.

Justice Matthews in *Poindexter vs. Greenhow*, 114 U. S., 270, 304: 'It is undoubtedly true that there may be cases where one part of a statute may be enforced, as constitutional, and another be declared inoperative and void, because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see, and to declare, that the intention of the Legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute for the law intended by the Legislature one they may never have been willing, by itself, to enact.' And again, as stated by the same eminent judge in *Sprague vs. Thomson*, 118 U. S., 90, 95, where it was urged that certain legal exceptions in a section of a statute might be disregarded, but that the rest could stand: 'The insuperable difficulty with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the Legislature of Georgia the statute is made to enact what, confessedly, the Legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted, in view of the illegality of the exceptions.' "

Without enlarging further on this proposition, it is submitted that the provisions of this Act are not separable, so as to permit the tax to stand (if it be considered as a license tax), so far as the occupation of removing whiskey from a warehouse for sale *in* Kentucky is concerned, while at the same time, holding invalid that part relating to the removal of the whiskey *out* of the State.

### THIRD POINT.

The act is unconstitutional because it is, in fact, a property tax, and, as such, it is in violation of the Kentucky constitution, §171.

The Kentucky Constitution, §171, as amended in 1915, provides as follows:

"The General Assembly shall provide by law an annual tax, which with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only and shall be uniform upon all property of the same class subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws.

"The General Assembly shall have power to divide property into classes and to determine what classes or classes of property shall be subject to local taxation."

Pursuant thereto, the General Assembly provided for an annual tax of 40 cents upon each \$100 in value of all property directed to be assessed (Ky. Stat., §4019, as amended March 5, 1918).

1. The Act under consideration, while literally providing for an "annual license tax," must be construed (in order to have any chance of constitutionality) as requiring *not* an "annual" tax, but as requiring only one tax, once and for all, upon each gallon of whiskey (see Brief of ATTORNEY GENERAL, p. 37-39). But that very concession destroys its constitutionality as a property tax under §171, which requires that it shall be "annual."

Therefore it cannot be justified, under Constitution, §171, which mandatorily provides for an "annual" tax.

2. It is void for another reason. Section 171 requires that all taxes levied thereunder "shall be uniform upon all property of the same class." The Legislature has never classified whiskey as a separate class; and therefore the tax upon whiskey must be the same as upon other property.

The Act now in question, however, imposes a tax of 50 cents a gallon, while all other property is taxed 40 cents on the \$100. For that additional reason this 50 cents a gallon whiskey tax cannot be sustained as the exercise of power under §171.

3. Whiskey is already subject to an annual tax of 40 cents per \$100 of value (R., 73), and it is therefore obvious that an additional specific tax of 50 cents a gallon cannot be imposed consistently with §171 (*Campbell County vs. City of Newport*, 174 Ky., 712, 723) when no similar tax is imposed on any other class of property.

In *Campbell County vs. City of Newport*, 174 Ky. 712, 723, it is said:

"Taxation that is not uniform is necessarily unequal and amounts to double taxation, whether the lack of uniformity or the appearance of duplication is exhibited in the exemption of some property from the tax or in taxing twice for the same purpose a part of the property subject to the tax. Double taxation and lack of uniformity are each alike vicious and unjust and opposed to the principles of equality and fairness upon which the merit of our whole scheme of taxation depends.

"In the present constitution there is a declaration that taxation must be uniform, but no direct prohibition against double taxation. But a prohibition against double taxation was hardly necessary, *because there cannot be such a thing as double taxation where the taxation is uniform*. Double taxation means taxing twice, for the same purpose, in the same year, some of the property in the territory in which the tax is laid without taxing all of it. If all the property in the territory upon which the tax is imposed



is taxed twice and for the same purpose and in the same year without discrimination or exemption, this is not double taxation in the sense that such taxation is prohibited, because, within constitutional limits, if the tax is uniform, the amount of it is in the discretion of the taxing authorities, and it may be levied at one time or it may be the subject of several levies. *Uniformity in taxation and double taxation are wholly inconsistent.* One cannot exist where the other is in force. And so if our constitutional scheme of uniform taxation is observed, there can be no double taxation. Cooley on Taxation, vol. 1, p. 394.

"In this connection it is worthy of notice that while there was no command in our former constitutions that taxation should be uniform or prohibition against double taxation, these principles had become so deeply imbedded in the fundamentals of the law that the courts of this State, before the adoption of the present constitution, as well as since, have consistently held that *taxation that lacked uniformity, or that was open to the objection that it was double taxation, was so obnoxious that it could not be sustained.*"

In *Raydure vs. Board of Supervisors*, 183 Ky., 84, 96, the court thus explained §171 as amended:

- "Previous to the amendment of section 171 of the Constitution by the amendment that was adopted in November, 1915, section 171 provided in part that 'taxes shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general law.'

"Under this original section it was held, in *Levi vs. City of Louisville*, 97 Ky., 394, that the Legislature had no power to substitute a license tax or any other kind of a tax in lieu of the uniform *ad valorem* property tax or to classify property for taxation.

"To escape the effect of this decision section 171 of the Constitution was amended as stated. By the amendment there was inserted in the original section

after the words 'they shall be uniform upon all property' the words 'of the same class;' and there was added to the section these words: 'The General Assembly shall have power to divide property into classes and to determine what class or classes of property shall be subject to local taxation.' It will thus be seen that the only change made by the amendment in the original section that is pertinent to the matter now being considered was that permitting the classification of property and the right to determine what classes should be subject to local taxation. It is further obvious that *until* a classification of property has been made a *uniform tax must be imposed upon all the property* subject to taxation within the territorial limits of the authority levying the tax, but if the property within the territorial limits has been divided, as it may be, into classes, then a different tax may be imposed upon the property in each class, but it, too, must be uniform upon the property in that class. There can be no lack of uniformity or discrimination in the imposition of taxes upon property in the same class, and *when there has been no classification the strict rule of uniformity obtains now as it did before the amendment.*

"It was held, as we have seen in the *Levi* case, that the Legislature was prohibited by section 171 of the Constitution from substituting a license tax for an *ad valorem* tax, and this prohibition was continued by authority of the amendment, property is classified, allowable under the amendment to substitute a license tax for an *ad valorem* tax than it was before the amendment. The only character of taxes that can be imposed under section 171, either before or since the amendment, is *ad valorem* or property taxes. If, by authority of the amendment, property is classified, as it may be, for taxation, the tax that is imposed on the class under this section must be an *ad valorem* or a property tax. Neither the rule of uniformity nor the nature of the tax was changed in any manner by the amendment. The only change was the authority to classify, but when the classification is made the tax imposed must be an *ad valorem* or property tax and must be a uniform tax."

This discussion need not be prolonged. It was expressly conceded below that this tax could not be sustained as a property tax under §171. (See Opinion, R., 70.)

The same concession seems to be made by the ATTORNEY GENERAL here (Brief, pp. 47-50), where he contends that the Act is not in violation of §171 because

*"This is not a property tax, but purely an occupational tax or an excise tax" (under §181).*

Having thus demonstrated that the tax, if it is a property tax, is void under section 171, it only remains to consider the question whether this is, or is not, a property tax.

The three judges below, DENISON, EVANS, and COCHRAN, JJ., held that it was a property tax in the clothes of an excise tax (R., 52, 74).

This is not a tax upon each gallon manufactured, which would then be an excise tax, but it is a tax on every gallon *owned* by any one. It is as specifically a property tax as could possibly be imagined. It was designed to reach every gallon of whiskey in Kentucky, because sooner or later every gallon would be forced out of bond by the United States internal revenue laws, if it had not been previously transported under bond out of the State.

#### FOURTH POINT.

**The Act is unconstitutional because it is not such a license tax, special or excise tax, as is authorized by the Kentucky Constitution, §181.**

The Kentucky Constitution, §181 (as amended in 1903), provides, so far as is relevant here, as follows:

*"The General Assembly may, by general laws only, provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations and professions, or a special or excise tax."*

The Act of March 12, 1920, provides that every person (R., 14)

"Engaged in the business of manufacturing distilled spirits,"

and every person

"engaged in the business of owning and storing such spirits in bonded warehouses in this State, and in removing same therefrom for the purpose of sale, or for any other purpose"

shall pay the 50 cents a gallon license tax on the spirits "so manufactured or stored," etc.

That language is reasonably susceptible of two interpretations, but in either event the law is void as to the Kentucky Co. with respect to the whisky here involved.

A. If it means that the license tax is imposed on every person "engaged in the business of"

"manufacturing distilled spirits \* \* \* and  
\* \* \* owning and storing such spirits,"

*i. e.*, as the ATTORNEY GENERAL contends (Brief, p. 39) that it was the Legislature's purpose to tax

"one continuous business *beginning* with the distiller;" and "*this entire business of distilling, owning and storing and removing from bonded warehouses should bear only the one tax as an occupational tax,*"

then, obviously, the tax cannot apply to the whiskey here involved, because the Kentucky Co. is not, and has not been, *since the Act was passed*, engaged in *manufacturing* the distilled spirits so owned, stored, and removed. All the whiskey was manufactured more than five years before the Act was passed (R., 4, 6, 76, 77).

Therefore, on that interpretation of the Act, it is inapplicable, because one essential element of the occupation taxed is absent, *i. e.*, the *manufacturing* of the whiskey.

A license tax on the *manufacturing, owning, storing and removing* of whiskey ("as one continuous business") can not apply to a person who is not engaged in "manufacturing," but only in "owning, storing and removing" whiskey.

A license tax on the manufacture and owning of tobacco would not apply to a cigar store, which while "owning" tobacco, did not "manufacture" it.

The present tax applies to the owner of a warehouse receipt, who purchased it yesterday, and desires today to remove the whiskey, in bond, to Ohio. He certainly has never been engaged in "manufacturing" the whiskey, which was not manufactured by any one since the Act was passed.

On that interpretation, the Act does not apply to this whiskey, but only to whiskey manufactured *after* the Act was passed; but whether, so construed, it is valid as to future whiskey, is a question not presented on this record (see Opinion below, R., 76-77).

The ATTORNEY GENERAL suggests (Brief, p. 40) that as the act of manufacturing whiskey might have been subject to a license or excise tax at the time of the distillation (five years ago) the mere fact that the Act is retroactive in its effect, is no objection to its validity.

We respond:

(a) The Act is not retroactive in its terms, which are apparently prospective only.

(b) No Act imposing liability is to be construed retroactively, unless the language plainly so requires.

(c) The tax is not levied on the person who *engaged* in the occupation of manufacture, but on the person who now happens to *own* the warehouse receipt, purchased perhaps yesterday. The distiller who alone engaged in the business of making whiskey, escapes the tax entirely.

In conclusion, it is submitted that if the Act, properly interpreted, is a license tax on the making of whiskey *plus* other activities (storage and removal), then it is inapplicable to whiskey made *before* its passage, or to the present owners

thereof, because one essential element in the occupation taxed is absent, *i. e.*, the act of manufacture.

B. If, however, the Act means that it imposes a tax on the mere act of owning, storing and removing whiskey from bond (as the ATTORNEY GENERAL contends is an admissible interpretation, Brief, p. 42), then we submit it is not a license or excise tax at all, but a mere property tax, which, as we have seen, is void under the Kentucky Constitution, §171 (p. —, *supra*).

The tax is clearly *not* imposed on the business of storing whiskey, in which event the tax would be levied on the operators of the storage warehouse, either in a flat sum, or in an annual sum, or on a sliding scale according to the amount stored, time stored, etc.

It is imposed upon the *act of ownership*; that is to say, not upon the act of storing for hire or gratuitously, for some one else, but upon the act of owning, storing (in the sense of keeping it safely), and removing it from bond, *i. e.*, in assuming physical possession of the thing owned. The lower Court aptly expressed this idea in its opinion (R., 74):

“\* \* \* out of several successive owners of warehouse receipts, who would thus engage in the storing business, all but the last one go free; the thing really taxed is the act of the owner in taking his property out of storage into his own possession (absolute or qualified) for the purpose of making some one of the only uses of which it is capable, *i. e.*, consumption, sale or keeping it for future consumption or sale.

“We cannot escape the conviction that it was the real purpose of those who drafted this law to levy a substantial tax upon this great body of property, as property, and that the form of an occupation or excise tax was adopted in order that an object might be accomplished which the Kentucky Constitution forbade. *It is a property tax in the clothes of an excise.* The whole value of the whiskey depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value.”

In *Pollock v. Farmers Loan & Trust Co.*, 157 U. S., 429, 158 U. S., 601, as interpreted in *Knowlton v. Moore*, 178 U. S., 41, 81, and as further approved in *Flint v. Stone Tracy Co.*, 220 U. S., 107, 148-150, it was held (the court's italics),

"\* \* \* that a tax which was in itself direct, *because imposed upon property solely by reason of its ownership*, could not be changed by affixing to it the qualifications of excise or duty. \* \* \*

"Considering that the constitutional rule of apportionment had its origin in the purpose to prevent taxes on persons *solely because of their general ownership of property* from being levied by any other rule than that of apportionment, two questions were decided by the court:

"First, that no sound distinction existed between taxes levied on a person solely because of his general ownership of real property, and the same tax imposed solely because of his general ownership of personal property."

In *Flint v. Stone Tracy Co.* it is said (p. 150):

"The *Pollock Case* construed the tax there levied as direct, *because it was imposed upon property simply because of its ownership.*"

In *Zonne v. Minneapolis Syndicate*, 220 U. S., 187, it was held that the Corporation Tax Law of 1909, which carried the doctrine of excise taxes to the extreme limit, could not reach a corporation which simply held title to a parcel of real estate and received and distributed the rental therefrom to its stockholders. The point of the decision was that the mere ownership of property, with the collection of the income therefrom and the distribution thereof to those beneficially entitled thereto, did not show the exercise of any occupation, privilege, or doing of business in a corporate capacity.

This was extended in *McCoach v. Minchill Railway Co.*, 228 U. S., 295, so as to hold that a railway company which leased its property for a long term of years and maintained

its corporate organization, collected rents, revenues, dividends and interest, declared dividends, managed its finances, invested its funds, paid taxes, preserved its corporate franchises, etc., was not doing business so as to be subject to the corporation excise tax. The opinion (p. 301) refers to the interpretations put upon the *Pollock Case* in subsequent decisions and emphasizes the fact that an excise tax could not be imposed upon property "solely because of its ownership," and the fact that a railway company *might* have exercised its power of eminent domain and other powers (but had not done so) would not make the tax applicable to it.

So here, the fact that the owners of the whiskey might in the future sell it or do something with it which would subject them to an excise tax is immaterial. The point is that the present tax is imposed solely because of the ownership of the whiskey. This is illustrated by the fact that the owner of the whiskey who buys a warehouse receipt on one day and removes the whiskey, in bond, to Ohio on the same day, is subjected to the tax, while all prior owners of the same identical whiskey, whose ownership may have extended over five years, are free of the tax. This shows that the tax is imposed, not because of any *occupation*, but merely because of the *ownership* of the property at the time it is transported in interstate commerce from Kentucky to Ohio. (See also *United States v. Emery*, 237 U. S., 28.)

As pointed out in the opinion below (R., 76), this Court in the *Zonne*, *Minchill* and *Emery* cases was trying to find the legislative intent in using the phrase "doing business," while we are concerned with the power of the Kentucky Legislature to impose an *excise* tax; but the power to impose an excise tax rests, at last, upon whether the person against whom the tax is assessed is "engaged in business," and thus the two questions come to be the same.

It is entirely possible that an excise tax can be constitutionally imposed upon the business of storing whiskey for



aging purposes, in which event it would be treated as a branch of the manufacturing business. But the act under consideration did not purport to do any such thing. The tax was not imposed upon the business of storing whiskey, whether it be looked at from the standpoint of the person operating the warehouse (in which others would store whiskey), or from the standpoint of the owner who stored his own whiskey, in order that it might become more palatable as an object of commerce. The tax here is the same whether the storage has been for one day or for five years; it draws no distinction between the warehouseman and the owner; it is only interested with the question of the *ownership* (regardless of the storage) at the particular moment when the whiskey is tax paid and removed from the warehouse or transferred under bond in interstate commerce from Kentucky to some other State. It is, therefore, plainly a tax upon the *ownership* of the whiskey and not in any sense a tax on the *business* of storing whiskey.

#### FIFTH POINT.

**The Kentucky Co. properly resorted to equity, as there is no adequate remedy at law.**

The ATTORNEY GENERAL contends that the Kentucky Co. had an adequate remedy at law under Ky. Stat., Sec. 162, as follows:

“When it shall appear to the Auditor, that money has been paid into the treasury for taxes, when no such taxes were in fact due, he shall issue his warrant on the treasury for such money so improperly paid, in behalf of the person who paid the same.”

and that the Kentucky Co. should, first, have paid the \$800,000 of taxes (now due) and sued the Auditor to issue a warrant for repayment.

Waiving the point that at the time the bill was filed and

the decree entered the law of Kentucky as then declared by its Court of Appeals did not authorize a taxpayer to recover at law (see opinion below, R., 63, 64), and that only since this case was advanced on the docket here has the Court of Appeals overruled its prior decisions and held (*Craig vs. Security Prod. & Refining Co.*, 189 Ky., 565, 568, decided November 16, 1920) that a taxpayer may mandamus the Auditor to issue his warrant for taxes illegally collected, we submit that no adequate remedy existed at law, and that only equity could give proper relief.

I. Although §162 has been in force for 75 years, it is the settled law in Kentucky that an injunction to prevent the collection of a void tax under an unconstitutional statute is the proper procedure, *because the remedy at law is not adequate* (*Gates vs. Barrett*, 79 Ky., 295; *Negley vs. Henderson Bridge Co.*, 107 Ky., 414; *Mt. Sterling Oil & Gas Co. vs. Ratliff*, 127 Ky., 1). This was recognized in *Bank of Kentucky vs. Stone*, 88 Fed., 383 (affirmed by a divided court, 174 U. S., 799), which was a suit to enjoin the collection of a tax in Kentucky where (notwithstanding §162) it was held that an injunction would lie, the Court (HARLAN, TAFT, and LURTON, JJ.), saying (p. 391):

"The practice of the State courts of Kentucky in issuing injunctions against the collection of taxes cannot, of course, be a controlling consideration in determining the limits of the equity jurisdiction in the Federal courts in such cases; for it is settled that if a case, in its essence, be one cognizable in equity, the plaintiff (the required value being in dispute) may invoke the equity powers of the proper circuit court of the United States whenever jurisdiction attaches by reason of diverse citizenship or upon any other ground of Federal jurisdiction." *Smyth vs. Ames*, 169 U. S., 466, 516.

"But it is worthy of note that the Court of Appeals of Kentucky has held that, in the absence of a statute allowing an action to recover back from the State

*taxes illegally collected, the remedy by injunction is the only adequate one."*

2. There are many reasons why there is no adequate remedy at law in the case at bar.

(a) *Multiplicity of Suits.*—As withdrawals from bond and shipments out of the State are taking place daily (R., 7), and the payment of the taxes must be made *monthly* (R., 15), it would be necessary for the Kentucky Company, or the owners of the whiskey, to bring a separate suit each month; not only would suit have to be brought each month, but there might be a *great many suits* brought each month by the *different owners* of the whiskey who were compelled to pay the tax.

Within less than a year the taxes against the Kentucky Company alone amounted to more than \$800,000, so that separate suits for very large sums would necessarily be brought each month.

(b) *Loss of Interest.*—Ky. Stat., §162, contains no provision for the repayment of interest. The Auditor is only authorized to issue his warrant for the face amount of the taxes paid. Therefore, with respect to the 30,000,000 gallons of whiskey in Kentucky on March 12, 1920, there will ultimately be something like \$15,000,000 of taxes paid to the State, of which the Kentucky Co.'s whiskey will bear a large portion. Even if successful in getting warrants from time to time from the Auditor, that would not mean the collection of the money, as will be presently seen. During the period of the litigation at law necessary to get the warrants, the taxpayer would lose the use of his money and could not recover any interest therefor. This circumstance alone shows that the remedy at law is not adequate, and that equity had to be resorted to in order to give complete relief to the taxpayer from an unconstitutional statute.

(c) *Treasurer Not Bound by Auditor's Action.*—If the action at law by mandamus were successful and the Auditor compelled to issue a warrant, still the Treasurer is not bound to honor the warrant. Even after it is issued by the Auditor the Treasurer may again raise the question of the validity of the warrant and of the Auditor's action in issuing it (*Rhea, Treasurer, vs. Newman*, 153 Ky., 604, 607-609). This shows that the taxpayer might have to embark in a *second litigation* to compel the Treasurer to recognize the validity of the Auditor's warrant.

(d) *Prior Appropriation Essential.*—Ky. Stat., §143, provides as follows:

"A warrant of the Auditor upon the Treasurer shall state upon its face the date, amount, the name of the person to whom payable and on what account, and out of what fund to be paid; and shall not be issued unless the money to pay the same has been appropriated by law; and he may require any claimant to state on the face of his claim the law under which it is payable."

Until, therefore, the Legislature has appropriated the money to pay the tax illegally collected under this unconstitutional law, even the Auditor cannot be required to issue the warrant; and, even if he does, *a fortiori* the Treasurer could refuse to pay it on the ground that there had been *no appropriation* made by the Legislature for its payment. It is hardly likely that the Legislature would make an appropriation necessary for the refund of taxes collected under one of its own laws until after litigation had established the invalidity of its prior act.

(e) *Delay in Payment by Treasurer.*—The Treasurer is only required to redeem the Auditor's warrants "if there be sufficient money in the treasury appropriated for that purpose" (Ky. Stat., §4688a-1); and whenever "the funds ap-

propriated for the purpose for which said warrant was issued are exhausted, the Treasurer shall endorse thereon the date of its presentation with the words "No funds with which to pay this warrant, and it bears 5 per cent interest from this date until called in" (Ky. Stat. §4688a-2); and whenever the Treasurer has as much as \$50,000 available for the redemption of warrants, he is required to redeem them in the order of serial number (Ky. Stat., §4688a-4).

It is thus seen that even assuming that a taxpayer has successfully run the gauntlet of one or more actions at law until he shall have secured an Auditor's warrant for the amount of his single monthly tax payment, still he only gets 5 per cent interest thereon (instead of the 6 per cent regular rate) and must await his turn until there is sufficient money to redeem the warrant.

As there were in 1912 more than \$2,000,000 of outstanding warrants against Kentucky (153 Ky., 606), which have since been increased to between \$4,000,000 and \$5,000,000, it will be seen that the prospect of the holder of a State warrant securing prompt redemption thereof is dubious, to say the least.

(f) *Warrants if Issued Probably Void.*—Up to this point we have tacitly assumed that warrants issued under Ky. Stat. 162, as urged by the ATTORNEY GENERAL, would be valid and ultimately paid to the taxpayer. In view, however, of the enormous sums involved under this "50 cent a gallon tax Act" which, if collected, spent, and then ordered refunded, would amount to millions of dollars, it is proper to note Ky. Constitution, §49, which provides as follows:

"The General Assembly may contract debts to meet casual deficits or failures in the revenue; but such debts direct or contingent, singly or in the aggregate, shall not at any time exceed \$500,000, and the moneys arising from loans creating such debts shall be applied only to the purpose or purposes for which they were obtained, or to repay such debts."

By §50 the General Assembly is forbidden to create any debt above the \$500,000 except by a vote of the people.

In *Stanley vs. Townsend*, 179 Ky., 833, the court held unconstitutional a large part of the Act of 1916 (Ky. Stat. 4688a above mentioned), and it would seem that the balance thereof was equally unconstitutional, although possibly not directly involved in that decision. The court pointed out that the Legislature could not provide for the payment of warrants issued by the Auditor (if the State's debt exceeded \$500,000) except by a vote of the people.

(g) *The Tax Illegally Collected Goes to the Counties Rather Than to the State.*—A final reason why there is no adequate remedy at law, is, that by §6 of the Act in question, 65 per cent of the taxes collected must go to the State Road Fund (R., 16). The State Road Fund is apportioned among the several counties (Ky. Stat. §4356x, as amended; see 2 Ky. Stat. (1915 Ed.), §4356x and 3 Ky. Stat. (1918 Ed.) §4356x-1).

*Mitchell vs. Knox County Fiscal Court*, 165 Ky., 543, shows how the money of the State Road Fund becomes the individual property of the several counties.

If the taxes under the Act in question should be paid by the taxpayers into the State treasury, 65 per cent thereof would soon be apportioned to the various counties in the State. The course which a taxpayer would have to follow at law in order to recover the taxes thus illegally collected from him would be a long and devious one, indeed.

3. From the foregoing review it can be readily seen that the taxpayer's remedy is *not adequate at law*. Therefore, the Kentucky Co. was compelled to resort to equity in order to test the validity of this Act.

LEVY MAYER,  
WM. MARSHALL BULLITT,  
*Counsel for Appellee.*

JANUARY 3, 1920.

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## POINTS AND AUTHORITIES.

### I.

	PAGE
1. Jurisdiction is founded upon:	
(1) Diversity of the citizenship of appellants and appellee and the amount in controversy, which, exclusive of interest and costs, exceeds three thousand dollars . . . . .	3
Judicial Code, Section 24, Subsections 1 and 14 (4 F. S. A. 839-840).	
Judicial Code, Section 52 (5 F. S. A. 519).	
(2) Because of the questions arising under the Constitution of the United States . . . . .	3
Greene, Auditor, et al., v. Louisville & Inter-urban R'y Co., 244 U. S. 499.	
L. & N. v. Bosworth, 209 Fed. 380; s. c. 230 Fed. 199; s. c. 244 U. S. 522.	
2. Statement wherein is considered prior and existing laws of Kentucky and the condition in which appellee was placed . . . . .	4
Kentucky Statutes, Sections 112 to 115.	
Constitution of Kentucky, Sections 171-172.	
City of Louisville v. Louisville Public Whse. Co., 107 Ky. 184.	
Commonwealth v. E. H. Taylor, Jr. Company, 101 Ky. 325.	
Jett Bros. Distillery v. City of Carrollton, 178 Ky. 561.	
Thompson v. Commonwealth, 123 Ky. 253; s. c. 209 U. S. 340.	



## ii

PAGE

Constitution of Kentucky, Section 181a.  
Raydure v. Board of Supervisors, 183 Ky. 84.  
Greene, Auditor v. Taylor, Jr. & Sons, 184  
Ky. 739.  
Kentucky Statutes, Section 4214a.  
The Volstead Act, Section 3, Article 2.

3. Consideration of so-called Vance Act levying  
a fifty-cent-per-gallon tax on owners of whisky  
stored in United States Bonded warehouses in Ken-  
tucky .....

5

## II.

**The Act is Confiscatory.**

14

## III.

**As a License Tax it is Void under Kentucky  
Constitution.**

21

Kentucky Constitution, Bill of Rights, Sec-  
tions 13 and 14.  
Owen County v. F. & A. Cox Co., 132 Ky. 738,  
743.  
City of Louisville v. Pooley, 136 Ky. 286.  
Sallsbury v. Equitable Purchasing Co., 177  
Ky. 348, 351, 354.  
Hager, Auditor, v. Walker, 128 Ky. 1, 9.  
Sperry & Hutchinson v. City of Owensboro,  
151 Ky. 389.  
Tandy & Farley Tobacco Co. v. City of Hop-  
kinsville, 174 Ky. 189.

## IV.

**The Act is Void for Uncertainty.**

PAGE 29

- Kentucky Constitution, Section 51.  
 Commonwealth v. Barney, 115 Ky. 475.  
 Joyce v. Woods, 78 Ky. 385.  
 Thompson v. Commonwealth of Kentucky,  
 209 U. S. 340, 346.  
 Commonwealth of Kentucky v. L. & N., 20  
 Ky. L. R. 491.  
 L. & N. v. Commonwealth of Kentucky, 18  
 Ky. L. R. 42, quoted in McChord v. L. &  
 N., 183 U. S. 498.  
 36 Cyc. 969, and cases cited.  
 First National Bank of Anamoose v. U. S.,  
 206 Fed. 374.

## V.

**The Tax Violates the Fourteenth Amendment of the United States Constitution.**

The Vance Act is purely arbitrary in its attempted classification of a business..... 34

- G. C. & F. S. R'y v. Ellis, 165 U. S. 150, 159,  
 160, 165.  
 Bell's Gap R. Co. v. Pennsylvania, 134 U. S.  
 232, 237.  
 Barbier v. Connolly, 113 U. S. 27, 31.  
 Henderson Bridge Co. v. City of Henderson,  
 173 U. S. 614.  
 City of Lexington v. McQuillan's Heirs, 9  
 Dana, 513-517.

	PAGE
(1) Mere ownership can not be instantaneously declared "engaging in business" .....	40
Hays v. Commonwealth, 107 Ky. 655, 658.	
Evers v. City of Maysville, 120 Ky. 74.	
Louisville Lozier Co. v. City of Louisville, 159 Ky. 178, 181.	
City of Newport v. French Bros., 169 Ky. 185.	
Commonwealth v. Chattanooga Implement & Mfg. Co., 126 Ky. 636.	
Zonne v. Minneapolis Syndicate, 220 U. S. 187.	
McCoach v. Minehill R'y Co., 228 U. S. 295-303.	
United States v. Emery, 237 U. S. 28-32.	
(2) The Vance Act imposes a direct ad valorem tax on the property .....	42
Constitution of Kentucky, Sections 171-172.	
Vance Act, Sections 6 and 8.	
Thompson, Auditor, v. Kreutzer, 112 Miss. 165 (72 So. 891).	
Thompson v. McLeod, 112 Miss. 383 (73 So. 193).	
Standard Oil Co. v. Commonwealth, 119 Ky. 75-80.	
Brown v. Maryland, 12 Wheat. 419, 444.	
Pollock v. Farmers' Loan & Trust Co., 157 U. S. 580.	
Almy v. California, 24 How. 169.	
Railroad Co. v. Jackson, 7 Wall. 262.	
Cook v. Pennsylvania, 97 U. S. 566.	
Greene, Auditor, v. L. & L R'y Co., 244 U. S. 499.	
L. & N. v. Bosworth, 209 Fed. 386; s. c. 244 U. S. 522.	
Raymond v. Chicago Union Traction Co., 207 U. S. 20.	

## VI.

**Jurisdiction in Equity.**

	PAGE
(1) Federal courts may adopt available equity proceedings of the local State courts and Kentucky courts sustain the right to injunction in such cases. .	52

Gates v. Barrett, 79 Ky. 295.

Negley v. Henderson Bridge Co., 107 Ky. 414.

Norman v. Boaz, 85 Ky. 557, 560.

Baldwin v. Shine, 84 Ky. 502, 510.

Fiscal Court v. F. & A. Cox Co., 132 Ky. 738.

Simkins' work "A Federal Equity Suit," p. 18.

Davis v. Gray, 16 Wall. 203-221.

Sawyer v. White, 122 Fed. 227.

National Surety Co. v. State Bank, 120 Fed. 593, 603.

Barber Asphalt Paving Co. v. Morris, 132 Fed. 945, 949.

Cowley v. Northern R'y, 159 U. S. 569, 582.

(2) No sufficient or adequate remedy at law. . . . .	56
--	----

Kentucky Statutes, Sections 162-163.

Boyce v. Grundy, 3 Peters, 210, 215.

Walla Walla v. Walla Walla Water Co., 172 U. S. 12.

Davis v. Wakelee, 156 U. S. 680, 688.

Union Pacific R. R. Co. v. Weld County, 247 U. S. 282, 285.

Greene, Auditor, v. Taylor, 184 Ky. 739.

Craig, Auditor, v. Security Producing & Refining Co.

Craig, Auditor, v. Frankfort Distilling Co., 189 Ky. 620.

Montenegro-Riehm Co. v. Board of Education, 147 Ky. 720.

Gordon v. Morrow, Governor, 186 Ky. 729.

Louisville Trust Co. v. Stone, Auditor, 107 Fed. 305, 309.

(3) Where equity jurisdiction attached at time of institution of suit subsequent changes of conditions do not defeat such jurisdiction ..... 68

Clark v. Wooster, 119 U. S. 322, 325.

Beedle v. Bennett, 122 U. S. 71.

Busch v. Jones, 184 U. S. 598.

Carnegie Steel Co. v. Colorado F. & I. Co. (C. C. A. 8th), 165 Fed. 195.

U. S. Mitis Co. v. Detroit, etc., Co. (C. C. A. 6th), 122 Fed. 863, 866.

Ransom v. Martinstein, 167 Calif. 406, 409 (139 Pac. 1060).

Lexington, etc., v. Canton, 171 Mass. 414 (50 N. E. 931).

Rosin v. Mayer, 244 Mass. 494 (113 N. E. 217).

(4) To avoid a multiplicity of suits and because of the excessive and oppressive penalties ..... 75

Greene, Auditor, v. L. & I. R'y Co., 244 U. S. 499.

Ex parte Young (Minnesota Rate Case), 209 U. S. 145 to 147.

Oklahoma Operating Co. v. Love, 252 U. S. 331-336-337.

## VII.

**Motion to Stay Proceedings.**

PAGE 74

Judicial Code, Section 266.

Kentucky Code, Section 110.

Newman's Kentucky Pleading & Practice,  
Sec. 196.

## VIII.

**Appendix.**

Act of Kentucky Legislature of 1920 known as Vance Act .....	89
Kentucky Constitutional provisions .....	94
Parallel columns of the original opinions rendered March 9th and opinion rendered on petition for rehearing November 16, 1920, in Craig, Auditor, v. Security Producing & Refining Company, and Craig, Auditor, v. Frankfort Distilling Company....	97

## ALPHABETICAL LIST OF CASES CITED.

	POINT
Almy v. California, 24 How. 169.....	V-2
Baldwin v. Shine, 84 Ky. 502, 510.....	VI-1
Barber Asphalt Paving Co. v. Morris, 132 Fed. 945	VI-1
Barbier v. Connolly, 113 U. S. 27, 31.....	V
Beedle v. Bennett, 122 U. S. 71.....	VI-3
Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 232	V
Boyce v. Grundy, 3 Peters, 210, 215.....	VI-2
Brown v. Maryland, 12 Wheat. 419, 444.....	V-2
Busch v. Jones, 184 U. S. 598.....	VI-3
Carnegie Steel Co. v. Colorado F. & I. Co., (U. S. C. C. A., 8th Cir.), 165 Fed. 195.....	VI-3
City of Lexington v. McQuillan's Heirs, 9 Dana, 513, 517 . . . . .	V
City of Louisville v. Louisville Pub. Whse. Co., 107 Ky. 184 . . . . .	I-2
City of Louisville v. Pooley, 136 Ky. 286.....	III
City of Newport v. French Bros., 169 Ky. 185....	V-1
Clark v. Wooster, 119 U. S. 322, 325.....	VI-3
Commonwealth v. Barney, 115 Ky. 475, 478.....	IV
Commonwealth v. Chattanooga Implement & Mfg. Co., 126 Ky. 636.....	V-1
Commonwealth v. E. H. Taylor, Jr. Co., 101 Ky. 325 . . . . .	I-2
Commonwealth v. L. & N., 20 Ky. L. R. 491.....	IV
Cook v. Pennsylvania, 97 U. S. 566.....	V-2
Cowley v. Northern R'y, 159 U. S. 582.....	VI-1

	POINT
Craig, Auditor v. Frankfort Distilling Co., 189 Ky. 620 . . . . .	VI-2
Craig, Auditor, v. Seenrity Producing & Refining Co., — Ky. — . . . . .	VI-2
Davis v. Gray, 16 Wall. 203-221 . . . . .	VI-1
Davis v. Wakelee, 156 U. S. 680, 688 . . . . .	VI-2
Evers v. City of Maysville, 120 Ky. 74 . . . . .	V-1
Ex parte Young (Minnesota Rate Case), 209 U. S. 145, 147 . . . . .	VI-4
First National Bank of Anamoose v. U. S., 206 Fed. 374 . . . . .	IV
Fiscal Court v. F. & A. Cox Co., 132 Ky. 738 . . . . .	VI-1
G. C. & F. S. R'y v. Ellis, 165 U. S. 150 . . . . .	V
Gates v. Barrett, 79 Ky. 295 . . . . .	VI-1
Greene, Auditor, et al., v. Louisville & Interurban R'y Co., 244 U. S. 499 . . . . .	I(2), V-2
Greene, Auditor, v. Taylor, Jr. & Sons, 184 Ky. 739, 743 . . . . .	I-2, VI-2
Gordon, etc., v. Morrow, 186 Ky. 729 . . . . .	VI-2
Hagar, Auditor, v. Walker, 128 Ky. 1, 9 . . . . .	III
Hays v. Commonwealth, 107 Ky. 655, 658 . . . . .	V-1
Henderson Bridge Co. v. City of Henderson, 173 U. S. 614 . . . . .	V
Jett Bros. Distillery Co. v. City of Carrollton, 178 Ky. 561 . . . . .	I-2
Judicial Code, Section 24, Subsections 1 and 14 . . . . .	I(1)
Judicial Code, Section 52 . . . . .	I(1)
Judicial Code, Section 266 . . . . .	VI
Judicial Code, Section 267 . . . . .	VI-2
Joyce v. Woods, 78 Ky. 386 . . . . .	IV



# I

	POINT
Kentucky Civil Code, Section 110.....	VII
Kentucky Civil Code, Section 276.....	VII
Kentucky Constitution, Section 171.....	I-2, V-2
Kentucky Constitution, Section 172.....	I-2, V-2
Kentucky Constitution, Section 181a.....	I-2
Kentucky Constitution, Section 51.....	IV
Kentucky Constitution, Bill of Rights, Section 13.	III
Kentucky Constitution, Bill of Rights, Section 14.	III
Kentucky Statutes, Section 4114a.....	I-2
Kentucky Statutes, Section 4214a-1.....	I-2
Kentucky Statutes, Section 162.....	VI-2
Kentucky Statutes, Section 163.....	VI-2
Kentucky Statutes, Sections 112 to 115.....	I-2
Lexington, etc., v. Canton, 171 Mass. 414, 50 N. E. 931, 932 . . . . .	VI-3
L. & N. v. Bosworth, 209 Fed. 380; s. c. 230 Fed. 199; s. c. 244 U. S. 522.....	I(2), V-2
L. & N. v. Commonwealth of Kentucky, 18 Ky. L. R. 42 . . . . .	IV
Louisville Lozier Co. v. City of Louisville, 159 Ky. 178, 181 . . . . .	V-1
Louisville Trust Co. v. Stone, Auditor, 107 Fed. 305, 309 . . . . .	VI-2
McChord v. L. & N., 183 U. S. 498.....	IV
McCoach v. Minehill R'y Co., 228 U. S. 295, 303..	V-1
Montenegro-Riehm Music Co. v. Board of Educa- tion, 147 Ky. 720 . . . . .	VI-2
National Surety Co. v. State Bank, 120 Fed. 593..	VI-1
Negley v. Henderson Bridge Co., 107 Ky. 414....	VI-1
Newman's Kentucky Pleading & Practice, Section 196 . . . . .	VII

	POINT
Norman v. Boaz, 85 Ky. 557, 560.....	VI-1
Ohio Tax Cases, 232 U. S. 576, 578.....	I
Oklahoma Operating Co. v. Love, 252 U. S. 331, 336, 337 . . . . .	VI-4
Owen County v. F. & A. Cox Company, 132 Ky. 738, 743 . . . . .	III
Pollock v. Farmers' Loan & Trust Co., 157 U. S. 580 . . . . .	V-2
Railroad Co. v. Jackson, 7 Wall. 262.....	V-2
Ransom, etc., Co. v. Martinstein, 167 Cal. 406, 409, 139 Pac. 1060, 1061.....	VI-3
Raydure v. Board of Supervisors, 183 Ky. 84.....	I-2
Raymond v. Chicago Union Traction Co., 207 U. S. 20 . . . . .	V-2
Report No. 1584, Judicial Committee, dated Feb- ruary 27, 1913.....	VII
Rosin v. Mayer, 244 Mass. 494, 113 N. E. 217.....	VI-3
Sallsbury v. Equitable Purchasing Co., 177 Ky. 348, 351, 354 . . . . .	III
Simkins on "A Federal Equity Suit," p. 18.....	VI-1
Sperry & Hutchinson v. City of Owensboro, 151 Ky. 389 . . . . .	III
Standard Oil Co. v. Commonwealth, 119 Ky. 75, 80	V-2
Tandy & Farley Tobacco Co. v. City of Hopkins- ville, 174 Ky. 189.....	III
Thompson v. Commonwealth, 123 Ky. 302, 209 U. S. 340 . . . . .	I-2
Thompson v. Commonwealth, 209 U. S. 340, 346..	IV

	POINT
Thompson, Auditor, v. Kreutzer, 112 Miss. 383, 73	
So. 193 . . . . .	V-2
Thompson v. McLeod, 112 Miss. 383, 73 So. 193 . . .	V-2
Union Pacific R. R. Co. v. Weld County, 247 U. S.	
282, 285, 217 Fed. 540, 222 Fed. 651 . . . . .	VI-2
United States v. Emery, 237 U. S. 28, 32 . . . . .	V-1
United States Compiled Statutes, Section 6062 . . .	1, V-2
United States Mitis Co. v. Detroit, etc., Co., 122	
Fed. 863, 866 . . . . .	VI-3
Volstead Act, Sec. 2, Art. 3 . . . . .	I-2
Walla Walla v. Walla Walla Water Co., 172 U. S.	
12 . . . . .	VI-2
Zonne v. Minneapolis Syndicate, 220 U. S. 187 . . .	V-1

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1920.

No. 582.

---

CHARLES L. DAWSON, Attorney General of  
the Commonwealth of Kentucky, and  
individually,

LOUISVILLE PUBLIC WAREHOUSE COMPANY,  
(a corporation),

JOHN J. CRAIG, Auditor of the Common-  
wealth of Kentucky, and individually, *Appellants,*

*v.*

THE J. & A. FREIBERG COMPANY (in-  
corporated), - - - - - *Appellee.*

---

**BRIEF FOR APPELLEE.**

---

This suit involves the constitutionality of an Act of the Kentucky Legislature, approved March 12, 1920 (known as the Vance Act), imposing a so-called "annual license" tax at the rate of fifty cents per gallon upon the business of owning and tax paying or transferring under bond distilled spirits from United States bonded warehouses in Kentucky. The Act is printed in full in the appendix hereof, p. 89, and also in the Record, p. 7, and in appellant's brief, p. 63.

Acting under Section 266 of the Judicial Code, and after elaborate preparation on the merits through affidavits and testimony taken before a Commissioner appointed for the purpose, the Honorable C. A. Denison, Circuit Judge, and the Honorable Walter Evans and Honorable J. E. Sater, District Judges, on May 31, 1920, granted a preliminary injunction restraining the collection of such tax, *Record*, p. 153, and delivered an able and exhaustive opinion, found in the *Record*, p. 126, and thereafter, on June 17, 1920, the same conclusion was reached in the case heard herewith of the same appellants against the Kentucky Distilleries & Warehouse Company, in the Eastern District of Kentucky, except that the Honorable A. M. J. Cochran, District Judge, sat in the place of the Honorable J. E. Sater, District Judge.

Appealing from the above mentioned preliminary injunction the appellants bring the record here for review.

**JURISDICTION.**

The jurisdiction is founded upon:

(1) The diversity of citizenship of the appellants and appellee, the amount in controversy, exclusive of interest and cost, exceeding three thousand dollars; Judicial Code, Section 24, Sub sections 1 and 14 (4 F. S. A. 839 840); and the residence of the Louisville Public Warehouse Company, one of the appellants in the Western District of Kentucky; Judicial Code, Section 52 (5 F. S. A. 518).

(2) Because of the question arising under the Constitution of the United States; *Greene, Auditor, et al., v. Louisville & Interurban R'y Co.*, 244 U. S. 499; *L. & N. v. Bosworth*, 209 Fed. 380; *s. c.*, 230 Fed. 199; *s. c.*, 244 U. S. 522.

Appellants urgently insist that there is no jurisdiction in equity because there is claimed to be an adequate remedy at law, and that the proceedings herein should be stayed under Judicial Code, Section 266, pending a final decision in a case in the state courts, and they avoid, so far as possible, a discussion of the merits in chief, but we believe that the jurisdiction of equity is clear and that the claim for a stay is fallacious, and that both of these questions may best be considered after the nature of the case is developed, and, therefore, will discuss them respectively under the next to the last and the last points in this brief.

**STATEMENT.**

The appellee, a citizen of Ohio who does no business in Kentucky, brought this suit in the District Court of the United States for the Western District of Kentucky, against the appellants as citizens of Kentucky, to enjoin them from withholding the property of the appellee valued at more than \$8,000.00. This property was represented by the ownership of negotiable warehouse receipts for 204 barrels, containing 9804.62 proof gallons, of whisky held in the United States general bonded warehouse of the defendant, Louisville Public Warehouse Company, at Louisville, Kentucky, and which whisky appellee desired to have transferred, not as a privilege or occupation but pursuant to the laws of the United States (U. S. Compiled Statutes, Section 6062), *under bond* to a United States general bonded warehouse in Boston, Massachusetts.

The appellant, Louisville Public Warehouse Company, conducts a United States general bonded warehouse, and claiming to be a designated collecting officer for the State of Kentucky declined to permit such removal, unless in addition to the payment of all other charges and taxes the appellee would pay the tax of fifty cents per gallon hereafter discussed, because its co-appellants, who are, respectively, the Attorney General of Kentucky who is charged with the duty of enforcing its law (Ky. Stats., Sections 111 to 115), and the Auditor of Public Accounts of Ken-

tucky, who is the chief fiscal officer of the Commonwealth and charged with the duty of receiving reports and payment required by the Act in controversy, were asserting its liability to the State of Kentucky for such tax and for the lien and heavy penalties attaching for a failure to pay such tax.

The Constitution of Kentucky, as to *ad valorem* taxes, provides in Section 171 that taxes "shall be uniform upon all property of the same class subject to taxation," and by Section 172 that "all property shall be assessed for taxation at its fair cash value estimated at the price it would bring at a voluntary sale."

Whisky in bond is valued by the State Tax Commission, sworn to assess it at its fair cash value, for *ad valorem* taxes and for the year in question appraised all the whisky stored in bonded warehouses in Kentucky at \$25 per barrel (or fifty cents per gallon), and on that basis the owners of warehouse receipts on whisky in bond are compelled to pay state, county, city, school and road tax rates levied by the jurisdiction in which the property is situate. *City of Louisville v. Louisville Public Warehouse Company*, 107 Ky. 184; *Commonwealth v. E. H. Taylor, Jr. Company*, 101 Ky. 325; *Jett Bros. Distillery v. City of Carrollton*, 178 Ky. 561; *Thompson v. Commonwealth*, 123 Ky. 302; s. c. 209 U. S. 340.

The appellants admit and concede that the tax in question would be void if an *ad valorem* tax upon the property itself.



The Kentucky Constitution by Section 181a provides:

"The General Assembly may, by general laws only, provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations and professions, or a special or excise tax \* \* \*."

Under this provision various license laws have been enacted in Kentucky, not for police regulation, but solely as revenue measures. *Raydure v. Board of Supervisors*, 183 Ky. 84; *Greene, Auditor v. Taylor, Jr. & Sons*, 184 Ky. 739.

Acting under Section 181a the Kentucky Legislature, by an Act of March 26, 1906 (Kentucky Statutes, Section 4114a), imposed upon those "engaged in the business of blending" or "rectifying"

"a license tax of one and one-fourth cents upon every wine gallon of such compounded, rectified, blended or adulterated distilled spirits."

In a general revision of the tax system of Kentucky the Kentucky Legislature, on May 2, 1917 (Kentucky Statutes, Section 4214a-1), adopted a license tax at the rate of two cents per proof gallon upon those who

"engage in the business or occupation of manufacturing distilled spirits known as whisky or brandy, or other species of such double stamp spirits in this state \* \* \*."

And apportioned the tax collected therefrom to the State road fund 20% thereof and to the school fund

30% thereof and 50% thereof to the general expenditure fund of the State, and further provided that for a failure to pay the tax within fifteen days after it became due, a penalty of 8% on the amount of the license should attach "and the Auditor shall at once cause such proceedings to be instituted for the collection of such tax" by suit.

That Act was construed by the Kentucky Court of Appeals in *Greene, Auditor v. Taylor, Jr. & Sons*, 184 Ky. 739-743, and was described as being "simply and purely a license tax" and

"it is not a tax upon the property nor its value but is a tax regulated as to its amount by the volume of business done by the corporation *for the privilege of engaging in the business of manufacturing double stamp spirits.*" (Our italics.)

The wartime prohibition act of Congress and the promulgation of the Eighteenth Amendment to the Constitution of the United States stopped all manufacture of distilled spirits in Kentucky, with an accompanying loss of state revenue. However, it appeared to the Kentucky Legislature of 1920 that 30,000,000 gallons (out of the 70,000,000 gallons in the United States) of such whisky was stored in United States bonded warehouses in Kentucky but being very rapidly withdrawn and sent to other countries and other states. Thereupon the Legislature of Kentucky passed, March 12, 1920, the law now in controversy, and which was approved the same day.

This Act in its main features follows closely the Act of May 2, 1917, last mentioned, but the present law is made applicable not only to the *manufacture in futuro* of such distilled spirits (as might be manufactured under special permit under the Act of Congress known as the Volstead law), but is also extended by Section 1 to include an

“annual license tax upon” every one “engaged in the business of owning and storing” distilled spirits “in bonded warehouses in this state, and in removing same therefrom \* \* \* for any purpose” or that may be from such bonded warehouses “transferred therefrom under bond out of the Commonwealth of Kentucky \* \* \*” “of fifty cents on each proof gallon.”

The Commonwealth is forced to concede that if the tax be annual it would be confiscatory, but it may be here noted that the tax levied is not only an increase of 2500% upon the *static condition of exercising the property right* of withdrawing the whisky from bond or removal under bond, as compared with the tax levied upon the occupation of manufacturing distilled spirits in the former Act, but is equal to 100% of the valuation of the commodity as fixed by the State Tax Commission for *ad valorem* value for the current year, and is under the proof in the case a tax of from forty to fifty per cent of the value of the whisky in bond represented by warehouse receipts, which have by the course of business for many years been traded in upon a margin of profit or loss

represented by but a few cents per gallon, with the net result that not simply is the possibility of profit wiped out, but from thirty-five to forty per cent of the capital invested in the occupation is forthwith seized, or, as has been said, "expropriated."

It is further to be noted that this license is payable only by the last owner of the warehouse receipts when and if he endeavors to exercise his right of ownership by withdrawing from bond or transferring under bond his whisky from a general bonded warehouse in Kentucky, whether he has been the owner for one minute or for ten years, and the numerous intervening owners of the negotiable warehouse receipt, which may be traded in, under Section 3, Article 2 of the Volstead Act, wholly escape any license or occupation tax on their ownership and storage, because the owners of receipts at the instant the law became effective could not sell their receipts to any one who would thereafter be subjected to such payment unless, in order to meet the competition from other states, the present owners would deduct from their sale price the fifty cent per gallon which would be ultimately payable by the last owner of the receipt when he came to withdraw his whisky from bond, or remove it under bond out of Kentucky; nor does the Act purport to apply to the Kentucky owners of warehouse receipts of whisky stored in bond in any other states, upon their occupation of owning and storing, tax paying and removing such whisky into Kentucky; nor in any way apply to those persons who may have

previously tax paid and lawfully own their whisky for sale, such as druggists. Therefore, it will be contended 'that the Act is so arbitrary in its classification as to be void, and is, in fact, nothing more than a direct additional tax upon the property itself as is illustrated by the emergency clause, which is as follows:

"8. Whereas, many persons \* \* \* are now engaged in the business covered and licensed by this Act, without paying an adequate license tax to the Commonwealth of Kentucky therefor; and whereas, *the liquor* which they are handling \* \* \* is constantly in large quantities being removed from the bonded warehouses and disposed of, *without the State securing an adequate license tax thereon*, an emergency is hereby declared to exist, and this Act shall take effect from and after the date of its passage and approval by the Governor." (Our italics.)

Section 2 requires sworn reports of bonded warehousemen only to be filed on the first day of June, 1920, and monthly thereafter, showing all the whisky in bonded storage, the number of proof gallons withdrawn or transferred.

Section 3 requires that:

All bonded warehousemen "shall, at the time said reports herein provided for are made, pay to the Auditor of Public Accounts the tax of fifty cents per proof gallon upon each proof gallon of such spirits removed from the bonded warehouse \* \* \* or transferred under bond out of this State, up to the date of making such re-

port; and for the purpose of securing the payment of the license taxes herein provided for, the Commonwealth shall have a lien on all such spirits stored in such bonded warehouses, together with the other property of the bonded warehouseman used in connection therewith; and in all cases where the spirits so removed or transferred were owned or controlled by another than the bonded warehouseman, *then the bonded warehouseman shall collect* and pay the tax due on such spirits so removed or transferred under bond, and shall be subrogated to the lien of the Commonwealth." (Our italics.)

Thus it is noted that the payment is to be made *by the warehouseman* to the Auditor, and that such *warehouseman is made a collecting officer* for the Commonwealth and subrogated to the Commonwealth's lien (if it is given a lien), and that there is no dealing between the owner and the Auditor or payment made by the owner of the whisky withdrawn to the Auditor, but the only transaction of the owner is with the bonded warehouseman, which, in turn, is put in such peril of liens upon its property and of the heavy fines to be now mentioned that the State, through indirection would force the tax from the owner.

Section 5 of the Act provides:

That any one failing to report and pay "shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than five hundred dollars, nor more than one thousand dollars, and each day after the date such report is due that such person \* \* \* is in default shall be treated and considered as a separate offense."

It may be noted that the license and penalties could not be more sweeping or drastic; that the present tax repeals by omissions the 8% penalty on the tax due and withholds the right of the State to sue for the tax as provided in the old law but relies solely upon the liens and penalties to force obedience to the law, and that these penalties attach irrespective of whether default be willful or merely careless, or whether for one gallon or ten thousand gallons, and are in such an amount that no one could afford to risk the penalties while testing the validity of the statute by any ordinary proceeding in court.

The situation of the appellee (and thousands of other owners of warehouse receipts for whisky stored in Kentucky in bonded warehouses in Kentucky), was this:

It had bought from the Imperial Distillery Company, at Stanley, Kentucky, negotiable warehouse receipts at the time of manufacture in the Spring of 1916 for 10,000 gallons of whisky, which was stored in that distillery bonded warehouse. In December 1919 the Imperial Distillery desired to close its bonded warehouse and cancel its bond given to the United States Government, and the appellee consented to the removal under bond of its whisky to General Bonded Warehouse No. 1 conducted by the appellant, Louisville Public Warehouse Company, which received it and issued its negotiable warehouse receipts evidencing appellee's ownership. On April

—, 1920, appellee desired to move its whisky under bond pursuant to the laws of the United States to General Bonded Warehouse No. 2, Boston, Massachusetts, conducted by the Quincy Market & Cold Storage Warehouse Company. As heretofore stated appellant, Warehouse Company, declined to permit the removal of the whisky under bond unless the appellee would pay, in addition to all other charges which were tendered, the tax at the rate of fifty cents per proof gallon as levied by the Vance Act, claiming it was threatened with exorbitant fines, penalties and liens, if it should permit such removal without the payment of such tax. To pay the tax would consume more than one-half of the value of the appellee's property.

Appellee, therefore, brought this suit assigning the unconstitutionality of the Vance Act under the Fourteenth Amendment of the Constitution of the United States, because it would deprive the appellee of its property without due process of law and deny to it the equal protection of the law, and because the Act was invalid under the Constitution and laws of Kentucky, either as an *ad valorem* tax or as a license tax.



## II.

**THE TAX IS CONFISCATORY.**

Before considering the legal phases it may be well to dispose of a question of fact raised by appellants and discussed in their brief, pp. 44 to 62, and applicable alike to the questions arising under the Federal and State Constitutions.

This question involves not simply an inquiry as to what portion of the value of the appellee's property may be appropriated by a tax of fifty cents per gallon, but as to what relation a tax of fifty cents per gallon bears to the general market value of all such property subjected to the tax. As a matter of fact the tax in appellee's case is demonstrated to be more than fifty per cent of the total value of its property and as heretofore noted the Act imposes a tax equal to 100% of the *ad valorem* valuation placed upon the whisky in bond for the current year by the Kentucky State Tax Commission, which under oath is charged with the duty of assessing all property at its fair cash value, and as a license tax is in the ratio of 2500% as compared with the formerly imposed license tax upon the occupation of manufacturing *in futuro* such distilled spirits.

After elaborate preparation by affidavits and evidence taken before the Commissioner, three Judges, constituting the lower court found the fact to be that the average market value of the whisky subjected to

the tax was not more than \$1.25 per proof gallon, and that the tax amounted on the average to 40% of the value. Record, pp. 149-150.

Nevertheless the appellants elaborately re-argued this question in this Court. The argument proceeds upon the assumption that by taking an excerpt from an affidavit of a Louisville broker, speaking generally of all market values, and combining with that an excerpt from an affidavit of a broker of Cincinnati, Ohio, each offered by appellee, and combining with these, excerpts from the testimony of some of the witnesses called and examined by the appellants, the result is that the ordinary doctrine of supply and demand does not operate in this case, but that the owners of warehouse receipts of whisky in bonded warehouses located outside of Kentucky have taken advantage of the law passed in Kentucky to uniformly raise their price commensurately higher so that the Kentucky owners may still get the same price as prior to the passage of the Vance Act.

This contention is made notwithstanding the direct, positive and unequivocal proof from witnesses, both of appellants and appellee, that immediately upon the passage of the Vance Act the Kentucky owners were compelled to reduce the current price of their whisky so as to themselves absorb or bear the increased burden placed upon their property, if they wish to sell, or for the thousands of owners of small lots, who had bought for their own requirements, to either abandon their whisky or pay the tax.

The evidence is overwhelming and, in fact, it is conceded that more than half of the whisky in bond is stored outside of Kentucky, viz., that there are between sixty million and seventy million gallons of whisky stored in bonded warehouses in the United States, and of these approximately thirty million gallons are stored in Kentucky in bonded warehouses; that the whisky stored in bonded warehouses is represented by warehouse receipts issued generally at the time when the whisky was made by the distiller, and that these receipts are for small amounts and in the hands of thousands of owners, and that the market price of whisky fluctuates widely in short times owing to the ordinary causes of supply and demand and the prices vary according to the nearness of the particular commodity to the point of demand.

The evidence shows that the current cost price of new whisky in bond was in 1916 from 50c to 75c per proof gallon; that the interest for the four years before it could be bottled amounted to about 25% of the cost, or from 12c to 17c per proof gallon; that the *ad valorem* taxes, warehouse fees and insurance premiums, and other charges, amounted to from 5c to 7c per proof gallon a year, or from 20c to 28c per gallon in four years; hence that the average cost of four-year-old whisky stood the owner from 80c to \$1.15 per proof gallon against a sales price of from 70c to \$1.25 per proof gallon, and that the contemplated profit of the ordinary owner of a warehouse receipt, for whisky in bond held for sale was figured

at a few cents a gallon, so that the tax of fifty cents per proof gallon could not possibly apply on the prospective profit of engaging in the business, but was an appropriation of from 40% to 50% of the owner's invested capital, levied, for a rightful ownership of four years, solely upon him if he or any subsequent owner of the receipt should exercise his right of property to withdraw his whisky from bond by tax payment or transferring it under bond out of the Commonwealth of Kentucky and even though this should be attempted immediately after the passage of the Act.

Appellants in this Court do not even refer to their incompetent and extraneous testimony as to the retail price of tax-paid, bottled and cased whisky, and special fancy brands, when offered by retail brokers to the drug trade, but as said before endeavor to combine excerpts from the testimony of various witnesses; and we will, therefore, limit our discussion of this question to a brief review chiefly of that testimony to which the appellants now refer.

The appellee's evidence establishes the general market value of whisky in bond and sold through a transfer of warehouse receipts at from 70c to \$1.25 original proof in bond. This proof is made, without substantial contradiction, by brokers and dealers of wide experience in market values.

George R. Landen, of Cincinnati, fixes the value at from 85c to \$1.00; Record, p. 28; Samuel Freedman, of Cincinnati, fixed the current market values

at from \$1 to \$1.25 if stored in Kentucky, and from \$1.50 to \$1.75 if stored out of Kentucky; Record, pp. 23, 24; Milton Barkhouse, of Louisville, Kentucky fixes a valuation of from 80c to \$1.00 per gallon with a loss of approximately 50c upon goods stored in Kentucky; Record, p. 26; Thomas S. Jones, of Louisville, Kentucky, fixed the current market price at from \$1.00 to \$1.25 per proof gallon; Record, p. 25; James Thompson, of Louisville, Kentucky, who fixed the current market price at from 75c to \$1.25 per gallon; Record, p. 30; all substantially supporting the allegation of the verified petition of the appellee who alleges its whisky to be worth from 75c to \$1.00 per gallon. Record, p. 13.

The appellants' only relevant evidence on this subject is to the same effect. William J. Gorman, of Frankfort, Kentucky, says, Record, p. 88, that he sold since March 12th whisky, which was made in the Spring of 1913, around one dollar, the highest being \$1.10 per gallon. This whisky represented 75% more carrying charges than the appellee's whisky made in 1916. And he also says distinctly, Record, p. 96, that the present value of these fancy brands of whisky is approximately \$1.00 per proof gallon, and that prior to the passage of the Act in question it was practically \$1.50 per proof gallon; and again on page 98, that the State Tax Commission of Kentucky, charged with the duty of valuing all property in the State at its fair cash value, placed a valuation upon whisky in bond of \$25.00 per barrel or 50c per gallon; and,

again, pp. 100 and 101, he identified an advertising circular of Freedman & Richards, dated May 11th, showing quotation of Old Crow Rye at \$1.15 per gallon in bond, and other whiskies, including Rye, located out of Kentucky, selling at from \$1.25 to \$1.40 per gallon, and quotations on Kentucky whiskies of that date at from 95c to \$1.25 per proof gallon.

Appellants' witness, A. B. Flarsheim, Record, p. 104, states that he is selling his whisky above the average price, by means of an expensive force of traveling salesmen, selling to the retail trade, but is receiving gross only about \$1.40 per gallon. On page 106 he stated that the average price for Kentucky goods is about \$1.00 per gallon, "some lower and some a little higher"; that for "goods stored in the market nearest the average consumption, which is New York and Boston," they bring from 50c to 75c higher.

Appellants' witness, Marion E. Taylor, of Louisville, Kentucky, Record, p. 113, says he has seen price lists recently where "you could buy a dozen different brands of Kentucky for less than \$1.00 per gallon" but speaking of his particular brand of "Old Charter" says that he sold it at from \$1.25 to \$1.75 per proof gallon, and also stated that "some of that whisky that we have sold for \$1.75 was in small quantities to retail customers." On page 111 this witness gives an illustration of his whisky stored in Kentucky where he offered the owner of a receipt \$1.25 per gallon for it, and after the passage of the Vance Act bought it from the owner of the receipt at 75c a proof

gallon. He also gives an illustration, Record, p. 113, of owning 240 barrels of spirits made and stored in Cincinnati, which he sold recently for 60c per gallon, and owning 200 barrels of the same spirits stored in Kentucky which, in view of the fifty cent tax on the spirits, could not be sold at all. On page 114 this witness shows that there are between sixty and seventy million gallons of spirits in bond in the United States and substantially half of it beyond the border of Kentucky.

Appellants' witness, A. C. Thompson, of Frankfort, Kentucky, shows, Record, p. 117, that his distillery has shipped 75 barrels out of the twelve thousand barrels held in storage since March 12, 1920, and, Record, p. 118, all of this "was shipped to people who had owned the receipts for some time."

The foregoing must clearly establish that the current market value of whisky in bond in Kentucky, in the hands of the holder of a warehouse receipt, is from 70c to \$1.25 per proof gallon and that, therefore, the tax is from 40% to 50% of its value.

## III.

**LICENSE TAX VOID UNDER KENTUCKY  
CONSTITUTION.**

As said, the practice in Kentucky is to adopt licenses upon occupations as revenue measure and not necessarily mere police regulations. The Kentucky Constitution in its Bill of Rights by Section 13 provides:

"nor shall any man's property be taken or applied to public use without the consent of his representative and without just compensation being previously made to him"

and Section 14 of the Bill of Rights of the Kentucky Constitution provides:

"All courts shall be open and every person, for an injury done to him and his lands, goods, person or reputation, shall have a remedy by due process of law, and right and justice administered without denial or delay."

The Court of Appeals of Kentucky has many times held invalid as unconstitutional license taxes which were prohibitive of making *profit* in any lawful business. Even, therefore, assuming for the sake of argument that the Legislature might classify as an occupation "the business of owning \* \* \*" whisky in bond, the proposed license tax in this case, even treating it as a single license tax and not as an annual license tax, as it is declared to be, is invalid, as the following cases from the Court of Appeals illustrate.



In *Owen County v. F. & A. Cox Co.*, 132 Ky. 738, 743, the Kentucky Court of Appeals had before it a suit to enjoin the collection of a license tax of two hundred dollars imposed upon four-horse wagons hauling freight for hire on the county highways. The Court heard evidence as to what the tolls would have amounted to if the turnpikes had not been free and as to the wear and tear on the roads, upon the one side, and found upon the other, saying:

“By the decided weight of the testimony of those who knew, it appears that the owner of a four-horse wagon, after paying the expense of running it and taking into consideration the depreciation in the value of the teams and the wagon itself, could make but little, if anything, more than the amount of the license tax imposed.”

The Court further said:

“The law is well settled that an injunction will lie to restrain the collection of an illegal tax.”

And, again:

“It may be conceded that ordinarily the reasonableness of a license fee imposed as a tax is a question for the taxing power, and the courts will not interfere with its discretion. (Citing authorities.) This rule we think, however, is subject to the limitation that the tax imposed shall not amount to a prohibition of any useful or legitimate occupation. (Citing authorities.)  
 \* \* \* We can hardly believe that the courts  
 \* \* \* would hold to be valid an ordinance or

*statute* imposing upon every physician and attorney at law an annual license tax of \$10,000, or imposing upon every merchant a license of \$5,000, or upon every washer-woman a tax of \$1,000 per year. If a prohibitive license tax could be imposed upon the professions and occupations mentioned above, the same character of tax could be imposed upon every profession and occupation. It may be answered that no *legislative* or municipal body would ever do this. The question, however, is not what it would do, but what it might do. A powerful organization of men engaged in different pursuits might prevent the imposition of a prohibitive license tax upon their respective callings or occupations, but what is to become of the man without political power, whose means of livelihood are taken away by the imposition of a prohibitive tax? Shall we still say that the amount of the tax is within the discretion of the taxing power, or shall we say that among the inalienable and inherent rights guaranteed by our Constitution to every law-abiding citizen is the right to live and enjoy life and the right to acquire property, and that these rights necessarily carry with them the right to gain a livelihood and acquire property by following any useful or legitimate occupation, the pursuit of which is not injurious to the public weal? In our opinion there is but one answer to this question: If you deprive a man of the means of livelihood, you necessarily deprive him of the right to live and enjoy his life. Great as is the taxing power, it can never rise superior to the inalienable rights guaranteed by our Constitution. As the evidence in this case shows that the license tax in question is prohibitive, we have no hesitancy in declaring it invalid. (Citing authorities.)

“Furthermore, the order itself shows that the owner of a four-horse wagon is required to pay three times as much tax as the man who operates a three-horse wagon, when there is nothing in the character of the wagons to justify such inequality. It may be conceded that a reasonable classification for the purpose of license taxes may always be made. Classification based upon the character of the vehicles and the number of horses used in connection with them may be proper (Citing authorities). But the classification sought to be made in this case is manifestly unequal and unreasonable. It can not be said to be reasonable because it bears alike upon all owners of four-horse wagons.” (Our italics.)

In *City of Louisville v. Pooley*, 136 Ky., 286, the Court of Appeals had before it a license tax of one thousand dollars a year upon persons engaged in the business of loaning money on chattel mortgages or assignments of salaries and wages due or to become due. After hearing testimony as to what the net earnings of such companies amounted to and striking an average, the court found that the license would amount to from twenty-five to forty per cent of such *net earnings*. It was contended in that case that the “loan-sharks” were undesirable and engaged in oppressive methods upon the poor. The Court answered both questions as follows:

“If this be the case we take it that such companies should be regulated by statute so as to remedy the evil. The taxing power should not be used to drive them out of existence.”

Upon the second question, the Court said:

“While it is true that the amount of a license fee imposed as a tax is ordinarily a question for the taxing power, and the courts will not interfere with its discretion, yet this court is committed to the doctrine that this rule is subject to the limitation that the tax imposed should not amount to a prohibition of any useful or legitimate occupation.” (Citing authorities.)

Continuing, the Court said:

“Furthermore, we have examined the license fees imposed on similar occupations, and find that the license fees in question are so much greater than the former that we conclude it was the purpose of the general council to make the license fees in question prohibitive.”

The Court, therefore, affirmed the decision of the lower court holding the license to be void.

In *Sallsbury v. Equitable Purchasing Co.*, 177 Ky., 348, 351, 354, the Court of Appeals of Kentucky again sustained an injunction against the imposition of a license tax upon a finding that it amounted to almost one-third of the net earnings of the business and was “unreasonable, confiscatory and prohibitive,” the Court saying:

“Notwithstanding the power of the city thus possessed, it is the settled law that a municipality in the exercise of the power may not impose a license tax in a sum that would be unreasonable, and which would amount to a prohibition of the continued engagement in that business. Ordinarily, and so long as the municipality stays

within the bounds of reason, the size of a license fee is a question for its determination, and so long as it exercises a reasonable discretion the courts will not interfere on the ground that the fee is unreasonable or prohibitive. This rule is of universal recognition and application, and we will not encumber this opinion with authorities.

"The unlimited freedom from judicial control does not extend to taxes imposed upon trades, occupations or professions. *Bells Gap R. Co. v. Pennsylvania*, 134 U. S. 232; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540. And the courts, when the question comes to them, have the undisputed right to determine whether or not a legislative act is in violation of the constitution, although its purpose may be the raising of revenue. *Thierman Co. v. Commonwealth*, 30 Ky. Law Rep. 72; *Ragland v. Anderson*, 125 Ky. 141.

"In the exercise of the authority to control the levying of occupation taxes, this court in a number of the cases held the license to be so high as to amount practically to a prohibition of the business, and, therefore, invalid and void. \* \* \*

"It is recognized in the case of *C. & O. R. R. Co. v. City of Maysville*, 24 Ky. Law Rep. 615, that although the attempted regulation may properly come within the valid exercise of the police power there may be cases so extreme in their nature as to authorize the courts to interfere and to declare the attempted exercise of the power invalid. This right of the court to interfere in such extreme cases is upheld in the cases of *Town of LaGrange v. Overstreet*, 141 Ky. 43; *City of Versailles v. Kentucky Highland Railroad Co.*, 153 Ky. 83, and *Tandy & Farley Tobacco Co. v. City of Hopkinsville*, 174 Ky. 189.

"In the *City of Versailles* case, quoting with

approval from the Overstreet case, this court said: 'But, extensive as their (municipal) authority is, there is the limitation and restraint upon its exercise imposed by well-established principles of law, that it must not be used in an unreasonable, arbitrary, capricious or oppressive manner, or to gratify malice or ill-will.'

"Numerous other authorities, both from this and other courts, might be cited in substantiation of the principle, but we deem it unnecessary, as the right of the courts to control the attempted regulations in such extreme cases is so universal, sound, proper and just that we presume no one will question it."

In conclusion, the Court said:

"In short, we hold that no municipality under a free government like ours has the power, either through the guise of regulation under the exercise of its police power, or in the imposition of license taxes, to so burden a legitimate business as to render it wholly unprofitable and to necessitate its abandonment."

Many similar decisions of the Court of Appeals of Kentucky may be quoted from but for brevity we merely refer to them. *Hager, Auditor, v. Walker*, 128 Ky. 1, 9; *Sperry & Hutchinson v. City of Owensboro*, 151 Ky. 389; *Tandy & Farley Tobacco Co. v. City of Hopkinsville*, 174 Ky. 189.

Applying these decisions to the present tax it is only necessary to observe that the Vance Act by its term and operation is a levy instanter on the static condition of owning whisky in bonded warehouses in Kentucky.

It has no relation to future profits to be derived from engaging in a business, nor is it attempted to be made commensurate with profits which might be earned in such business, but imposes the tax directly on present owners who, by virtue of the existence of the law must pay for the persons who may subsequently acquire the negotiable warehouse receipts, and may at some indefinite and undetermined future time endeavor to tax pay or to remove under bond their whisky and be held liable therefor, because to sell their warehouse receipts in competition with the thousands of owners of warehouse receipts in other states the present owners must deduct from their sale price the tax which will subsequently attach to the final owner of the negotiable receipt when he undertakes to withdraw or remove his whisky.

It has furthermore been shown that by no possible construction of this law could it be made a tax on the profits of the business but is, in fact, a seizing of the property itself.

Therefore, under the law of Kentucky as a license tax applicable only to present owners and wholly ignoring others, who may in due course acquire the property from present owners, the so-called license tax is void, and it is, as a matter of fact, as we will *hereafter show nothing* but a property tax in the disguise of a license.

## IV.

**ACT IS VOID FOR UNCERTAINTY.**

One of the notable changes made in the phraseology of the Vance Act as compared with the preceding act, is that in the title it is declared to be "An Act imposing an annual license tax," and under Kentucky Constitution, Section 51, it is required that the subject of the act "shall be expressed in the title," of which the Kentucky Court of Appeals says:

"So that the matter of selecting an expressive and accurate title is committed directly to the Legislature, and its being fairly expressive of the context of the bill is an imperative condition to the validity of the act. It is essentially a part of the act, not only because it has been selected and adopted by the Legislature as one of the tests of their meaning as expressed in the bill, but because the Constitution has made it a part, *and the controlling part*, of the law to which it applies. It is therefore not only useful, in affording a fair index of the legislative intent in case of ambiguity in the context, *but it must be read in connection with the remainder of the act*—as a part of it—in determining what is the law." (Our italics.)

Commonwealth v. Barney, 115 Ky. 475, 478;  
Joyce v. Woods, 78 Ky. 386.

And Section 1 of the Act joins together the manufacturer *in futuro* of distilled spirits and the owner of existing spirits in bond, and declares that they

"shall pay an annual license tax \* \* \* of fifty cents on every proof gallon of said distilled



spirits so manufactured or stored in a bonded warehouse, *or* withdrawn from a bonded warehouse or transferred therefrom under bond out of the Commonwealth of Kentucky."

The appellants admit that this means "an annual license tax" measured by the volume of business so far as the manufacturer is concerned, but they say as officers they will construe the third section of the Act, as to when payments are to be made by the warehouseman, to mean one payment only upon each gallon of whisky stored in bond, irrespective of how long it may have been in bond, and that they will construe the language last quoted in connection with the preceding clause, and with the title of the Act, so as to read the disjunctive "*or*" as a conjunctive "*and*."

If the title of the Act is so potent in the latter respect, why not equally so as to the words "annual license tax"? And if this is an annual tax as to the manufacturer, why is it not equally so as to the owner who is joined with the manufacturer in the same sentence? Again they answer, because if an annual tax as to the owner it would clearly be spoliation and such construction must be avoided to save the Act.

But they can not bind the courts of Kentucky, nor is their interpretation a protection to the owners who they ask to take the risk. In *Thompson v. Commonwealth of Kentucky*, 209 U. S. 340, 346, it was said:

"Due process of law does not assure to a tax payer the interpretation of laws by the executive.

officers of a state as against their interpretation by the courts of the state, or relieve from the consequences of a misinterpretation by either \* \* \*. It is the province of the courts to interpret the laws of the state and he who acts under them must take his chance of being in accord with the final decision. And this is a hazard under every law and from which, or the consequences of which, we know of no security."

A further illustration of the uncertainty of the Act is that the fourth section provides a license tax of fifty cents per gallon on the distiller for whisky hereafter manufactured, and, apparently, the subsequent owner, when he withdraws the spirits from bond, if the law is valid, will have to pay an additional fifty cents per gallon. But again appellants come to the rescue of the Act with the suggestion that they will construe the Act to impose but one tax on the combined business of the two so-called occupations, and that they will leave (appellants' brief, p. 30) the apportionment of this one tax between the various parties.

They further argue (appellants' brief, p. 34):

"The evident purpose of the Legislature was that this entire business of distilling, owning, storing and removing from bonded warehouses, should bear only the one tax as an occupation tax. The fact that a portion of the Act constituting the business has already been performed at the date of the passage of the law could in no wise affect the validity of the Act."

If, then, on subsequent manufacturers the license on the business of manufacturing is to be pro rated, or "split fifty-fifty," between the manufacturers and the business of the subsequent owner in withdrawing, and the distiller, who manufactured the appellee's whisky four years ago, was not subjected to any tax, and, in fact, has gone out of business, there is clear discrimination against the present owners of whisky, in that they will be required to pay a tax which was not levied against the distiller and their occupation will be subjected to an unequal burden on the same class of business with the owners of whisky subsequently produced.

Section three of the Vance Act asserts a lien for the Commonwealth not only on the property of the warehouseman used in connection with the storage for the tax due from another, but also undertakes to assert such lien if one owner of whisky in bond withdraws it without paying the tax and the warehouse company fails to collect the tax from him "on all such spirits stored in such bonded warehouses" apparently without regard to the ownership of such spirits. It is too obvious to need argument that the property of A cannot be taken to pay the debt or taxes of B. This same section undertakes to give a lien upon the whisky of each individual for the tax which it seeks to impose on the whisky of every owner who withdraws the same. But this lien only arises after the whisky has been "removed or transferred" out of the

State, and, of course, out of the possession of the warehouseman. So it is very difficult to see how such lien could exist or be availed of either by the Commonwealth or by the warehouseman by subrogation thereto.

It is, therefore, submitted that the Act is so ambiguous, indefinite and uncertain as to render it void :

Commonwealth of Ky. v. L. & N., 20 Ky. L. R. 491.

L. & N. v. Commonwealth of Ky., 18 Ky. L. R. 42;  
quoted in *McChord v. L. & N.*, 183 U. S. 498.  
36 Cyc 969, and cases cited.

First National Bank of Anamoose v. U. S., 206  
Fed. 374.

## V.

**THE TAX VIOLATES THE FOURTEENTH AMEND-  
MENT OF THE CONSTITUTION OF THE  
UNITED STATES.**

We fully concede the broad discretionary powers vested in the legislative branch of the State government to levy taxes and to classify property for the purpose of licensing business, and yet contend that action by the State may clearly be so purely arbitrary and beyond reasonable limitations and usage of laws, as to come within the inhibition of the Fourteenth Amendment of the Constitution of the United States as construed by this Court.

In *G. C. & F. S. R'y v. Ellis*, 165 U. S. 150, Mr. Justice Brewer speaking for this Court, after reviewing the subject of classification, p. 155 said:

“Yet it is equally true that such classification can not be made arbitrarily. \* \* \* These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect of which the classification is proposed, and can never be made arbitrarily and without such basis.”

Again at page 159:

“But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this.”

Again at page 160:

"No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government."

Again at page 165:

"It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection. Tested by these principles the statute in controversy can not be sustained."

In *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 237, Mr. Justice Bradley, speaking for this Court, only limited the equality clause of the Fourteenth Amendment in its application to state tax systems, which were adopted in proper and reasonable ways, and where the state proceeded within reasonable limits and general usage, and said:

"But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the

subject, that would include all cases. They must be decided as they arise."

In *Barbier v. Connolly*, 113 U. S. 27, 31, Mr. Justice Field speaking for this Court said:

"The Fourteenth Amendment \* \* \* undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty or arbitrary *spoliation of property*, but that equal protection and security should be given to all under like circumstances, in the *enjoyment of their personal and civil rights*; that all persons should be equally entitled to pursue their happiness and acquire *and enjoy property* \* \* \*." (Our italics.)

In *Henderson Bridge Company v. City of Henderson*, 173 U. S. 614, Mr. Justice Harlan, speaking for this Court said:

"It is conceivable that taxation may be of such a nature and so burdensome as properly to be characterized a taking of private property for public use without just compensation.

"But in order to bring taxation imposed by a State or under its authority within the scope of the Fourteenth Amendment of the National Constitution, the case should be so clearly and palpably an illegal encroachment upon private rights as to leave no doubt that such taxation by its necessary operation *is really spoliation under the guise of exerting the power to tax.*" (Our italics.)

No court has more vehemently asserted the protection of private property under the constitutional

guarantees than Chief Justice Robertson, of the Court of Appeals of Kentucky, in the early case of *City of Lexington v. McQuillan's Heirs*, 9 Dana. 513-517, where, speaking of the Kentucky constitutional limitations upon taxation, he said:

"The object of this great guarantee was to secure every citizen against spoliation by a dominant faction, or by a rapacious public power, acting in obedience to the will of a constituent body for whose use his property may be taken, and from whom no similar contribution is required. It intended that public responsibility, and the power of exaction for public use, should be, in some degree, commensurable; and, therefore, it should be understood as providing that the public shall not take the property of any citizen for its own use, without his consent, or an equivalent in money, or in similar contributions by itself.

"If this be not its practical effect, it is a mere *brutum fulmen*, and may always be evaded by exactions *made in the false semblance of taxation.*" (Our italics.)

Let us apply these principles to the Vance tax.

First, is it an occupation tax and found upon any proper classification; or, second, is it an *ad valorem* tax.

License taxes have been frequently imposed in Kentucky on the privilege of engaging *in futuro* in various occupations, but in no instance has there been any imposition of a tax on an occupation or doing business comparable either in rate or classification to the Vance Act.



Probably the heaviest license tax ever imposed in Kentucky was the license tax "for the privilege of doing the business" of producing crude petroleum, which was based on 1% of the actual value of the oil produced from the well, and sustained because such an occupation took from the state one of its natural resources. *Raydure v. Board of Supervisors*, 183 Ky. 84-99.

As heretofore noted the tax on the occupation or privilege of engaging in the business of manufacturing, storing and selling double stamp spirits was at the rate of two cents per gallon, whereas the tax now imposed is fifty cents per gallon or 50% of the total value of the property when the owner merely endeavors to exercise his right of ownership by having his existing property removed under bond out of the state.

The Act purports to levy the tax on the owners of negotiable warehouse receipts issued by Kentucky bonded warehouses, irrespective of their occupation or residence, but does not endeavor to tax the residents of Kentucky who own negotiable warehouse receipts for whisky in bonded warehouses outside of Kentucky, even though they may withdraw and remove such whisky to Kentucky.

The Act excludes from its operation those owners of tax paid whisky who had removed it to free storage warehouses, but hold negotiable receipts therefor which they might, if licensed, sell or use for their own purposes.

The Act purports that it is as much a doing business for a non-resident to withdraw the whisky whether the owner of the warehouse receipt, under the authority of the Volstead Act, purchased the warehouse receipt within one hour before the time withdrawal or removal is demanded, as it is for a resident to leave his whisky in bonded storage for years for the purposes of ageing.

The Act gave no option as to whether the persons to be affected might continue to engage in business, but seized, through its emergency clause, upon an existing condition, and was a deliberate effort to prevent the escape from the tax of any whisky in bonded warehouses in Kentucky.

There is no conceivable or suggested reason for any distinction in the licensing of "the occupation" of tax paying or removing under bond whisky from Kentucky bonded warehouses, and the exercise of any right of dominion over any other form of property, and especially since the passage of the prohibition acts whisky as a commodity has ceased to be a matter for police regulation but is a form of property used under license for pharmaceutical purposes and entitled to the same protection as any other form of property.

**(1) Mere Ownership.**

Furthermore, in seeking to single out a single act of ownership of one class of property, which under the laws of the United States does not even require the personal presence of the owner in Kentucky, and declaring that the license is for "engaging in such business," is a purely arbitrary and fallacious misnomer.

The Court of Appeals of Kentucky has many times construed what character of business may be licensed and as to what acts constitute "engaging in business" or "doing business" in the state, and has held that to constitute any business, occupation or profession which can be licensed "it must be a considerable part of one's occupation, business or vocation," or, as again expressed, it must be "a material part of his business." *Hays v. Commonwealth*, 107 Ky. 655, 658; *Evers v. City of Maysville*, 120 Ky. 74; *Louisville Lozier Co. v. City of Louisville*, 159 Ky. 178, 181; *City of Newport v. French Bros.*, 169 Ky. 185; *Commonwealth v. Chattanooga Implement & Mfg. Co.*, 126 Ky. 636.

These decisions construing what is an occupation or doing business are in perfect accord with the decisions of the highest courts of practically all the states of the Union and with the frequent decisions of this Court, in construing the Act of Congress of August 5, 1909, levying a special excise tax on cor-

porations for the carrying on or doing business by such corporations; *Zonne v. Minneapolis Syndicate*, 220 U. S. 187; *McCoach v. Mine Hill R'y Co.*, 228 U. S. 295-303; and which are reviewed and approved in *United States v. Emery*, 237 U. S. 28-32, again reaching the decision that the corporation was not engaged in business, and saying:

"The question is rather what the corporation is doing than what it could do, 228 U. S. 305, 306, but looking even to its powers they are limited very nearly to the necessary incidents of holding a specific tract of land. The possible sale of the whole would be merely the winding up of the corporation. \* \* \* The claimants' characteristic charter function and the only one that it was carrying on was the bare receipt and distribution to its stockholders of rent from a specified parcel of land. Unless its bare existence as an intermediary was doing business, it is hard to imagine how it could be less engaged."

It is not conceivable that there could be less occupation or doing of business in Kentucky than is involved where the owner of whisky, represented by negotiable warehouse receipts and which whisky is stored in the only place permissible under the laws of the United States, forwards his receipt to one bonded warehouseman with instructions to forward the whisky under bond to another United States bonded warehouseman. This, as we will contend presently, is simply an act and incident of the right of ownership of property. It is not engaging in any business, and beyond the levy of the so-called occupa-

tion tax for doing of the business, is rested simply upon the last owner of the negotiable receipt who forwards it to the warehouseman and requests the forwarding of his property.

Therefore, for these reasons it is submitted that the Act is purely arbitrary in its classification and not within any of the reasonable limits or usages of such laws, and, therefore, comes within the prohibition of the Fourteenth Amendment as construed by this Court.

## (2) Direct Property Tax.

The Vance Act is, in fact, and shown upon its face to be, a plain and direct tax upon one species of property. Appellants admit that if this is true the Act is clearly void under the Kentucky Constitution, which requires, in Sections 171-172, that all property shall be taxed uniformly by the jurisdiction levying the tax and all shall be appraised upon a uniform basis. This property has already been appraised and subjected to all the *ad valorem* taxes levied in the jurisdictions in which the property is located.

Not only is the license for the so-called occupation of removing the whisky measured by the quantity of whisky which may be covered by one warehouse receipt or one act of ownership, but the emergency clause clearly demonstrates that it was the property itself which the Legislature hoped to seize. Section 8, in part, provides:

“And whereas, *the liquor* which they are handling and in which they are dealing is in large quantities being removed from the bonded warehouses and disposed of, without the State securing an adequate license tax *thereon*, an emergency is hereby declared to exist \* \* \*” (Our italics.)

Section 6 of the Act, in distributing 65% of the tax to the road fund and 35% to the general expenditure fund, conclusively shows that the revenue to be raised was not for the purpose of protecting or regulating either the whisky already subject to *ad valorem* taxes or the business or occupation of the owner.

That the tax rests upon the property and not upon an occupation is made perfectly apparent by noting the operation of the so-called license tax. It is levied instantaneously through the Emergency Clause upon the then owners of whisky in bond. They could not even transfer, as appellees desired to do, their own property under bond out of Kentucky nor could they dispose of their property through a sale of their negotiable warehouse receipts because no prospective purchaser could be found who would buy such receipts when offered in competition with the vast amount of whisky stored in bonded warehouses in other States than Kentucky, unless the owner desiring to sell, would himself absorb or deduct from the sale price the prospective tax which such subsequent owner would be compelled to pay to secure his property when he desired to taxpay it and withdraw it

from bond or transfer it under bond out of the Commonwealth of Kentucky, and, therefore, it is apparent that "the occupation of owning, storing and withdrawing" is not taxed, because the only tax collected from any person engaged in such business, was that forced instantaneously upon the present owners with no election or opportunity upon their part to determine whether they would engage in such business or not. This tax is levied wholly irrespective of any possible profits to be derived from engaging in business but solely upon a static condition, as distinguished from engaging in a pursuit designed to earn an income or produce profits.

The owners of warehouse receipts for whisky stored in Kentucky had a property right and the only use which they could make of their property would be to withdraw it from bond and sell it to those licensed to buy or to remove it under bond for safer keeping and for like purposes. Either such removal under bond or withdrawing from bond is but the simplest act of ownership and without that right of ownership there is no property.

In *Thompson, Auditor v. Kreutzer*, 112 Miss. 165, 8. e., 72 So. 891, the Supreme Court of Mississippi, in holding unconstitutional a license tax imposed upon the business of owning or holding more than one thousand acres of timber lands, said: .

"In order that a thing may be owned, some one must, of course, have a right to the ownership thereof. A tax on a thing is a tax on all

its essential attributes and a tax on an essential attribute of a thing is a tax on the thing itself. So that, a tax on a thing owned is necessarily a tax on the right of ownership thereof; and a tax on the right of ownership of a thing is necessarily a tax on the thing itself. No definition of property can be framed which does not include the right of ownership. Consequently, no tax can be imposed on the right of ownership which is not also a tax on property."

In *Thompson v. McLeod*, 112 Miss. 383, 73 So. 193, the same court said of a license tax imposed on the business of extracting turpentine from trees:

"The act under review does not levy a privilege tax on the right or privilege of selling resin or the gum of the tree as originally extracted \* \* \* but the privilege, if any, which is taxed, is the privilege or right of the owner or lessee of pine trees 'to extract turpentine from standing trees.' \* \* \*"

"This act strikes down the inherent right of the property owner to lay hand upon his own property. Every owner of a pine tree enjoys the same natural right to extract gum from the tree as the owner of a vineyard has to pluck his own grapes. \* \* \*"

"There cannot be ownership of standing pine trees without an owner, and if you tax the standing trees with an *ad valorem* tax, and at the same time exact tribute from the owner as a condition precedent to his right to lay hands upon the tree, the state is imposing double taxation upon the tree itself." (Our italics.)

The Court of Appeals of Kentucky, speaking through Judge E. C. O'Rear, in *Standard Oil Com-*



pany v. Commonwealth, 119 Ky. 75-80, had before it the validity of a state license on the business of conducting an oil depot where oil was stored in bulk, and after a consideration of the various license taxes which might be imposed, the law was upheld as a police regulation because of the highly inflammable and dangerous qualities of such property. But the court conceded that if the tax were not upon the occupation, the law would be void, saying:

"The object of the license is to confer a right that does not exist without the license. \* \* \* The right to own a house in which oil might be stored is not prohibited by any law. Consequently, the granting of a license for that purpose gives no right. The right of acquiring property and protecting it, found in the Bill of Rights, is even above the right of taxation, for the exercise of the former can not be denied until a license to exercise it has first been obtained from the State. \* \* \*"

"The authority of *Livingston v. Paducah, supra*, aside from the reasons already advanced, would force us to say that the tax in this case was also invalid, although imposed as a license and not a property tax, if the subject of it is the oil depot or building \* \* \*."

Chief Justice Marshall said for this Court in *Brown v. Maryland*, 12 Wheat. 419, 444, in relation to a tax on the occupation of an importer, that it was the same as a tax on the imports, and, therefore, void.

"It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition which

is general, as if it were confined to a particular mode of doing the forbidden things. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself."

We submit it is equally obvious that for Kentucky to levy an occupation tax on the owner of a warehouse receipt covering whisky stored in United States bonded warehouses in Kentucky upon the exercise of his right of withdrawal, is just as clearly the levying of a tax on the commodity itself.

Again this Court said in *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 580:

"The name of the tax is unimportant. The real question is, is there any basis upon which to rest the contention that real estate belongs to one of the two great classes of taxes, and the rent or income which is the incident of its ownership belongs to the other? We are unable to perceive any ground for the alleged distinction. An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income."

This opinion reviews many cases of similar effect, such as *Almy v. California*, 24 How. 169, holding a duty on a bill of lading was the same thing as a duty on the article which it represented; *Railroad Co. v. Jackson*, 7 Wall. 262, that a tax upon the interest payable on bonds was a tax not upon the debtor but upon the security; and *Cook v. Pennsylvania*, 97 U. S. 566, that a tax upon the amount of sales of

goods made by an auctioneer was a tax upon the goods sold.

And this Court has frequently held that for the taxing authorities of a state to uniformly impose upon one class of property a different mode of assessment resulting in an inequality of a tax burden where uniformity of the tax burden was required, entitled the taxpayer to relief under the Fourteenth Amendment. *Greene, Auditor v. L. & I. R'y Co.*, 244 U. S. 499; *L. & N. v. Bosworth*, 209 Fed. 380; s. c., 244 U. S. 522; *Ohio Tax Cases*, 232 U. S. 576, 587; *Raymond v. Chicago Union Traction Co.*, 207 U. S. 20.

It is submitted that the Vance Act is clearly intended to subject all whisky in bonded warehouses in Kentucky to a tax at the rate of fifty cents per proof gallon, and is merely disguised by the unimportant name of a license tax upon the occupation of the owner, when such owner comes to exercise an inherent and necessary right of property; and, therefore, it is submitted that the appellee is entitled to the protection of the Fourteenth Amendment of the Constitution of the United States because of a denial to it of the equal protection of the laws and a taking of its property without due process of law.

## VI.

**JURISDICTION IN EQUITY.**

A court of equity has jurisdiction because there is no adequate remedy at law, and there was danger of imminent irreparable injury to appellee.

Appellée owning 204 barrels of whisky in bond in Kentucky found itself confronted with a situation by reason of the provision of the Vance Act which precluded its selling its whisky in ordinary course of five or ten barrel lots to the drug trade unless it would sacrifice more than 50% of its invested capital; it could not sell its whisky in competition with that of other owners who had whisky in bonded storage beyond the jurisdiction of Kentucky and which supply, the proof shows to be sufficient to supply the demands of the United States for at least five years in the future; it had a commodity which was not only very expensive to carry but which, by natural loss, was subject to shrinkage and evaporation (the United States Government allows for this to the extent of seven and one-half gallons per barrel for the eight-years bonded period, but it is well known that the actual outage is even greater); and its commodity was in a United States bonded warehouse not equipped to bottle the whisky and not located nearest to the existing demand, which conditions were fulfilled by the United States bonded warehouse at Boston, Massachusetts.

Leaving out of view the numerous other owners of approximately one million barrels of whisky in Kentucky, situated similarly as appellee, the appellee owned 204 barrels, and had the legal right, under the laws of the United States, and by virtue of its ownership, to withdraw this whisky in small lots of five and ten barrels for the drug trade month by month, or at longer periods if it so desired, or as it could dispose of its commodity.

The Commonwealth was asserting a lien upon appellee's whisky and demanding that monthly payments should be made by appellee thereunder to the appellant warehouseman, who in turn would account to the Auditor, and who alone had any dealings or relations with the Auditor or State treasury.

If appellee paid the warehouseman it had no control over it as to when and how the latter would pay the money into the State treasury, or as to whether it would pay under the "mistaken belief" that the tax was not due, or pay under protest. The warehouseman is not by law or the regulations made by the Department required to keep any record of its transactions with the storer, or to make any report whatever to the Commonwealth of Kentucky as to whose whisky has been withdrawn, but is solely, under the second section of the Act, required to report how many proof gallons in the aggregate have been withdrawn from its bonded warehouse and to pay the tax thereon.

The only remedy of appellee would be against the warehouseman in a suit to recover its payments, and the warehouseman might or might not prove solvent to respond to a judgment, if obtained.

It is suggested by the appellants, that the appellee might wait indefinitely for some one else to test the constitutionality of the law, but the penalties announced in the Act are such that, unless a court of equity will act, no one would come forward and take the responsibility of the test case. In the meantime the appellee's whisky would be depreciating in value through "outage" and the carrying charges for warehouseman's fees, insurance premiums, state, county, city, road and school taxes, might preclude the possibility of ever realizing on the investment.

In this situation appellee's right to resort to equity is founded upon the following principles: *first*, as the courts of Kentucky have adopted the rule that an illegal tax levy upon personalty creates a cloud which equity will remove, and that such a levy may be enjoined because a remedy more direct and effective than a suit to recover back after the money has been commingled with public funds, "a party by going into the national courts does not lose any right or appropriate remedy of which he might have availed himself in the state courts in the same locality"; *secondly*, the Federal rule is that the remedy at law must be plain, adequate, practical and efficient, and the suggested remedy at law by paying and suing for a refund under Kentucky Statute, §162 does not ful-

fill any of these requirements; *thirdly*, to avoid a multiplicity of suits; and *fourthly*, because of the numerous and excessive penalties.

**(1) Federal Courts May Adopt Available Equity Proceedings of the Local State Court.**

1. The Act plainly endeavors to create a lien upon the appellee's personal property and under the equity jurisdiction of the courts of Kentucky they will remove the cloud created by an illegal tax levied upon personalty. *Gates v. Barrett*, 79 Ky. 295; *Negley v. Henderson Bridge Co.*, 107 Ky. 414.

The equity jurisdiction of the courts of Kentucky to restrain an illegal tax levy may be at variance with the equitable remedies adopted in other jurisdictions, but it is nevertheless one of the remedies afforded by the equity jurisdiction of Kentucky.

In the case just cited of *Gates v. Barrett*, 79 Ky. 295, the appellees were residents of Henderson County and reported their personalty for taxation, but were also assessed by Daviess County on the sum of twenty thousand dollars employed by them in that county in the purchase of tobacco, and the Court of Appeals of Kentucky said:

“The right to have an injunction to restrain the collection of an illegal tax has been so long recognized and acted upon in this state that it is unnecessary to stop to inquire upon what ground that jurisdiction is exercised by courts of equity. The jurisdiction in this case, however, may be

placed upon the ground of the inadequacy of the remedy at law."

In *Norman v. Boaz*, 85 Ky. 557, 560, the last quotation was approved by the Court of Appeals with the addition of the statement that it would follow this rule "*whatever may be the rule in other states.*"

In *Baldwin v. Shine*, 84 Ky. 502, 516, the court enjoined the making of an assessment by a county judge based upon a statute permitting the county judge to assess property wholly omitted from taxation, and in granting the injunction said:

"The question arises in limine whether the remedy by injunction will lie. In many of the states equity will not enjoin even the collection of an illegal tax; and much less an assessment, because the assessor is regarded as a *quasi* judicial officer. It is said that public policy, which will not brook delay in the public business, requires this rule.

"It seems to us, however, that the evils flowing from its enforcement overbalance this consideration. It is an object of equity to foresee and prevent wrong. One of its principal offices is to avoid multiplicity of suits and circuitry of action. By this rule the tax payer is left to sue the collecting officer. This is unjust to both. It produces expensive litigation between two innocent parties, one of them being involved in it by reason of an honest effort in official duty. The courts of Illinois, Indiana, Pennsylvania, and some other states, including this one, have discarded this rule, and hold that a court of equity may enjoin the collection of an illegal tax."



In *Fiscal Court v. F. & A. Cox Company*, 132 Ky. 738, the Court of Appeals of Kentucky said:

“The law is well settled that an injunction will lie to restrain the collection of an illegal tax.”

Appellants strenuously relied in the lower court, and in this Court rely, upon the injunction of the Franklin Circuit Court in the case of *S. Rosenbloom & Company v. E. H. Taylor, Jr. & Company* (Record, pp. 42-60), wherein a different plaintiff upon different grounds attacked the constitutionality of this same Vance Act, but therein secured an injunction which is relied upon as a bar to the further prosecution of this proceeding, under Section 266 of the Judicial Code. This case, however, illustrates that the Courts of Kentucky are taking cognizance of suits to enjoin and are enjoining the collection of this tax.

It has been held for years that the equity jurisdiction extends to cases of injunction against illegal collection of taxes in the State of Kentucky. In *Louisville Trust Co. v. Stone, Auditor*, 107 Federal, 305, 309, the Circuit Court of Appeals for the Sixth Circuit said:

“The federal jurisdiction having been properly invoked, we may examine into the other questions made in the case, notwithstanding as to them there may be a remedy in the State Court. In *Bank v. Stone* (C. C.), 88 Fed. 383, heard in the Circuit Court before Justice Harlan and Judges Taft and Lurton, it is expressly held

*that an action in equity will lie to enjoin illegal taxation in Kentucky, as the Statutes of that State do not afford an adequate remedy at law."*  
(Our italics.)

If parties suing in the state courts of Kentucky have the right or appropriate remedy, which will be administered by the courts of Kentucky in equity, it is clearly established that the Federal courts may, in their discretion afford to parties rightfully suing in the Federal Court the same relief.

Thus it is said in Simkins' work styled "A Federal Equity Suit," page 18:

"It has been frequently declared that 'a party, by going into the national courts, does not lose any right or appropriate remedy of which he might have availed himself in the state courts in the same locality.' Davis v. Gray, 16 Wall. 203-221; Sawyer v. White, 122 Fed. 227; National Surety Co. v. State Bank, 120 Fed. 593; Barber Asphalt Paving Co. v. Morris, 132 Fed. 945; Cowley v. Northern R'y, 159 U. S. 582."

We do not elaborate this point because the authorities cited in support of the text more than fully sustained it.

The resolution of this point in our favor really supersedes the necessity of considering the next point, but we shall nevertheless show in its consideration that there is no adequate remedy at law.

**(2) No Sufficient or Adequate Remedy at Law.**

This brings us then to a consideration of the chief attack of appellants on the jurisdiction in equity which is that an adequate remedy at law exists under Kentucky Statutes, Sections 162-163, which provide:

“When it shall appear to the Auditor that money has been paid into the State treasury for taxes when no such taxes were, in fact, due, he shall issue his warrant on the treasury for such money so improperly paid in behalf of the person who paid the same.”

The Act further refers to such payment by the taxpayer into the treasury as a “mistaken payment.”

The question then arises whether this Act met the requirements of appellee's situation so that it might pay the money and sue the Auditor by a mandamus and secure a refund in the form of a State warrant, which under the practice of Kentucky would be paid with 5% interest from the date of issue one or two years thereafter.

In *Boyce v. Grundy*, 3 Peters, 210, 215, this Court in construing Section 267, Judicial Code (Section 1244, U. S. Compiled Statutes) said:

“It is not enough that there be a remedy at law; *it must be plain and adequate*, or, in other words, as *practical and efficient* to the ends of justice and its prompt administration as the remedy in equity.” (Our italics.)

In *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 12, this Court, discussing this subject, used the following language:

"This Court has repeatedly declared in affirmance of the generally accepted proposition that the remedy at law, in order to exclude a concurrent remedy at equity, must be as *complete*, as *practical* and as *efficient* to the ends of justice and its prompt administration, as the remedy in equity." (Citing authorities.) (Our italics.)

In *Davis v. Wakelee*, 156 U. S. 680, 688, there was room for a doubt as to the actual state of the law of New York with reference to a material point in that case. The defendant objected to the maintenance of the bill in equity in that case on the ground that there was a remedy at law. This Court advert-  
ing to the doubtful character of the legal remedy said:

"In the uncertainty which appears to exist in that State, as to whether a complaint setting forth all the facts would or would not be demurrable, we think it may be fairly said that *the remedy at law is not so plain or clear as to oust a court of equity of jurisdiction*. It is a settled principle of equity jurisprudence that, if the remedy at law *be doubtful* a court of equity will not decline cognizance of the suit. (Citing authorities.) Where equity can give relief plaintiff *ought not to be compelled to speculate upon the chance of his obtaining relief at law*." (Our italics.)

In the recent case of *Union Pacific R. R. Co. v. Weld County*, 247 U. S. 282, 285, the District Court denied the injunction and dismissed the bill on the ground that a statute of Colorado afforded adequate relief at common law by a suit against the Board of County Commissioners levying the tax. This judgment was affirmed by the Circuit Court of Appeals for the Eighth Circuit, 217 Fed. 540, which on petition for rehearing adhered to its position, 222 Fed. 651.

The Colorado statute in question was very much clearer and stronger than the provisions of Section 162 of the Kentucky Statutes, as we shall presently show.

This Court reversed the judgment of the lower courts and held that the remedy afforded at law by the Statute of Colorado was "not free from difficulty" saying:

"An examination of the new statute shows that the controversy just outlined is not without some real basis and that its solution is not free from difficulty. The question is purely one of state law, and, so far as we are advised, the Supreme Court of the State has not passed on or considered it. A ruling by us on the question would neither settle it for that court nor be binding in an action to recover the tax if paid. In these circumstances it cannot be said that the company certainly or plainly has an adequate and complete remedy at law. On the contrary, the existence of such a remedy is debatable and uncertain. And this being so, the situation is

not one in which cognizance of the present suit properly can be declined.

"With the question of equitable jurisdiction out of the way, the District Court should dispose of the application for a temporary injunction on the merits and otherwise proceed with the suit in regular course."

Let us apply these principles to Section 162 of the Kentucky Statutes in appellee's case.

This Section 162 of the Kentucky Statutes has been construed in many cases by the Court of Appeals of Kentucky.

In *Greene, Auditor v. Taylor*, 184 Ky. 739, the Court of Appeals of Kentucky said:

"If one, with a knowledge of the fact that he did not owe the tax, should voluntarily pay it into the treasury, upon what could he base a right to ask a court of equity to exercise its powers and processes to compel a return of it to him? As said in *Tyler, et al., v. Smith*, 18 B. M. 707, 'the doctrine is well settled, that where a man demands money of another as his right, and the other, with a full knowledge of all the facts and of his rights, voluntarily pays the money thus demanded, he cannot recover it back. *Bean v. City, etc.*, 22 Ky. L. R. 415; *City of Maysville v. Milton*, 19 Ky. L. R. 1032.'"

Again it is said in this case:

"However, as regards the payment of taxes \* \* \* the general rule which now prevails is that taxes paid to counties, cities, towns and county officers, collecting the state's revenues and other collecting officers, if the taxes are voluntarily paid, they cannot be recovered, al-

though not due, and paid under a mistake of law. *City of Louisville v. Anderson*, 79 Ky. 334; *L. & N. v. Hopkins County*, 87 Ky. 605; *L. & N. v. Commonwealth*, 89 Ky. 531." (Our italics.)

Appellants rely upon the second opinions delivered November 16th and November 23, 1920, on petitions for rehearing from the first opinions rendered March 9, 1920, in the companion cases of *Craig Auditor, v. Security Producing & Refining Company* and *Same v. Frankfort Distilling Company*. For convenience the first and second opinions are printed in parallel columns in the appendix, p. 97.

These last opinions, as we will next discuss, overrule *some* of the previous well-settled conditions precedent to recovery back from the State Treasury but *still adhere to the above mentioned conditions precedent*, and in fact emphasize them, as excerpts from the opinions will show. The italics throughout are our own. It was said—

That there must be "proper application *by the person paying the same*";

That it must appear that

"demand has been made for its return *within the time and in the manner* provided by Section 163";

That the payment must have been made

"through the mistake or inadvertence *of the taxpayer, directly into the Treasury or to the Auditor*";

But that taxes paid to

*"sheriffs \* \* \* and other collecting officers cannot be recovered although not due and paid under a mistake of law";*

And again that

*"the auditor is not required to go into or review assessments of taxing agencies to determine whether the payment is due or not";*

But if all the conditions have been complied with

*"he shall issue his warrant on the treasury \* \* \* in behalf of the person who paid the same";*

And again

*"but he will be held to strict accountability and in doubtful cases refuse payment until the question has been determined by the courts";*

And

*"he may be compelled by mandamus to issue his warrant on the treasury in repayment of the sum."*

What then are these requirements; *first*, the money must be paid into the treasury of the State and must be paid by the tax payer to whom the Auditor's warrant may issue; *secondly*, that there must be a mistaken belief that the tax was due; *thirdly*, that the tax must be paid under protest; and, *fourthly*, if paid to any other collecting officer for the Commonwealth it cannot be recovered back.



Under the terms of the Vance Act the appellee makes no report to the Auditor nor pays any money whatsoever into the State treasury. As to it no public record is kept upon which to determine what payments the appellee may have made, or to distinguish its payments from the payments of all other owners to the warehouseman, who alone is required to report on his gross quantity on hand, gross withdrawals, and show the net balance remaining in storage, and it is against the warehouseman that the liens and penalties are primarily aimed.

Appellants frankly admit in their brief, p. 36, that by this law the warehouseman is made

*“the collecting agency of the State and he is required to make the reports, showing the amount of the tax due on each reporting day. \* \* \** No separate tax is required of the owner and storer of liquor as long as it remains in the bonded warehouse.”

And appellants' counsel might have added, nor is any form provided by the Auditor's office, nor contemplated by the Act, for the owners to ever make any report whatever to the Auditor nor to pay any money into the treasury or to Auditor.

The State of Kentucky has many collecting officers and collecting agencies and those collecting the greatest part of the State's revenue are the one hundred and twenty (120) county sheriffs who account for their collections to the Auditor and pay them in to the State Treasury (Kentucky Statutes, 4143) and

payments to them have been and are expressly held not recoverable, though not due and though paid by mistake, and *in no case* has it ever been decided in Kentucky, so far as we can discover, that money can be recovered back *when it has been paid to a collecting agency*.

This thought is but further illustrated when it is recalled that the appellants are most strenuously insisting that only one tax is imposed (appellants' brief, pp. 32-35). It would be imposed instantan upon appellee if it exercised the property right of having its whisky removed under bond out of the Commonwealth of Kentucky. It would also be imposed if appellee had, instantly after the passage of the Act and its approval by the Governor, attempted to dispose of its warehouse receipts to those who under the Volstead Act would have the right to tax pay the whisky and withdraw it from bond because under the ordinary laws of competition and of supply and demand no subsequent prospective purchaser of warehouse receipts would buy receipts on whisky stored in Kentucky unless the owner reduced his price and thereby paid the tax which would subsequently be demanded upon the withdrawal or tax payment of the whisky.

Therefore, as it has been heretofore argued, the tax is one levied directly on the property itself.

But if the tax is so deductible from the present owner it is not even paid by him to the warehouse but must be paid by the unknown final owner who withdraws the whisky from bond or removes it out of

Kentucky under bond, only in the uncertain and, perhaps, far distant future, when he comes to exercise his so-called occupation of owning, storing and withdrawing, but the *appellee* has in fact lost the equivalent of the tax *through the deduction from the sale price*. Thus it may be said the *present owners* of the warehouse receipts pay the tax in advance *for the final unknown owners* when they shall hereafter come to engage in the business, but the present owners have no privity or relation whatever either with the warehouseman, or the State Treasurer or the Auditor. It does happen that the warehouse company's books in this case would show appellees' name as the original party to whom the negotiable warehouse receipt was issued, but thousands of owners are holding warehouse receipts which have been issued to others and simply transferred to them by indorsement and delivery, so that such *present owners*, when the law became effective, *are absolutely unknown to the warehouseman* or to the Auditor and there would be no means of their establishing their payment or loss.

In such circumstances the appellee had no means of knowing whether the warehouseman would keep a separate record of its transactions, or would make a payment under protest, or as to whether the warehouseman believed the tax to be valid and due, or knew or felt certain that the law was invalid and the tax was not due, but nevertheless might proceed to

pay it into the State treasury without protest and bar appellee's recovery.

Appellee cannot sue at law for a State warrant under Section 162 of the Statute, because *it is not required to and could not pay the money into the State treasury*, and the Auditor has no record as to the amount which might be due to the appellee. The warehouseman might or might not keep a correct record, and it might require a law suit against the warehouseman to determine appellee's proportion of the total payments made by the warehouseman.

It cannot, therefore, be said that the appellee had any *clear and definite remedy* or standing under this statute, or that the Federal courts, to which the appellee had the right to resort, would create or set up means of affording relief to appellee in the light of the principles for repayment long adhered to by the Court of Appeals of Kentucky.

Furthermore at the time this suit was filed and the injunctive relief was granted and the property removed and the bond given, the Federal jurisdiction in equity was most clearly sustained. Section 162 of the statute as *then construed* by the Court of Appeals of Kentucky in its *first* opinion in the case of Craig, Auditor v. Frankfort Distilling Company, decided March 9, 1920, required as further conditions precedent to the right of a tax payer to recover, in addition to all the requirements above described, that the tax could not be recovered unless the collec-

tion thereof could be enforced by distraint, the court saying:

“The tax here sought to be recovered is not such as could have been distrained, but the Commonwealth could have enforced collection, if at all, only by an action at law. This would not have amounted to distraint; and taxes collectible by actions only, as in this case, and paid without such suit, are paid voluntarily and are not recoverable by the payor \* \* \*.”

It was further held that such tax could not be recovered because the tax payer had not exhausted his legal remedies in resisting it, the court saying in this respect that

“it was entitled to have a rehearing had it requested one, and when the Auditor certified the amount to the Treasurer the corporation had yet another chance to avoid payment, as it may then have enjoined collection of the taxes, but after all these steps had been regularly taken and the money paid into the treasury and mingled with other public moneys and distributed by the State, it was too late for the corporation to take the initial step to recover it.

“It follows, therefore, that the Chancellor erred to the prejudice of the appellant in granting the mandamus, requiring the Auditor to draw his warrant on the treasurer for the money paid as tax when none were due.”

Undoubtedly the tax in the case at bar is not recoverable by distraint but the Commonwealth has relied solely upon penalties and the lien on the property of the warehouseman, and there is no provision

in the Vance Act for a suit, but on the contrary the Act is an amendment in this respect of its predecessor, which in express terms authorized for default in payments suit to be brought for a recovery by the State.

Such was the law of Kentucky when this suit was brought and the appellee put to an election as to what it should do, or as to what jurisdiction it might seek, and *Federal jurisdiction in equity* clearly attached under the construction given to the state laws by the highest court *up to the time* when this suit was brought and the temporary relief prayed had been granted. But appellants now place their sole reliance in this respect upon the fact that the Court of Appeals of Kentucky, on November 16, 1920 (*long after this record had been lodged in this Court*), withdrew in the respects last mentioned its opinion of March 9, 1920, and rendered the decision quoted in appellants' brief, pp. 10 to 14, as the whole foundation for his argument that there was an adequate remedy at law under Kentucky Statutes, Section 162. In its last opinion in the Craig case the Court of Appeals, in respect to the necessity for distraint and of standing suit or exhausting the remedies, not only withdrew two previous opinions but overrules by name four previous decisions on this point and adds the blanket clause:

“and all other cases announcing a similar rule insofar as they conflict with the construction herein given, Section 162 Kentucky Statutes are expressly overruled.”

That, in this respect, the law of Kentucky was directly to the contrary from that now asserted by appellants is shown in the companion case of *Craig, Auditor v. Frankfort Distilling Co.*, 189 Ky. 620, decided November 23, 1920, in which the Court said:

“When the Auditor declined to issue his warrant on the treasury for said sum in favor of the Frankfort Distilling Company he transgressed the provisions of Section 162 Kentucky Statutes, and therein failed to perform his duties. This, of course, was brought about by a former construction given that section of the Statutes by this Court, and the Auditor is not to blame in the slightest degree. He was merely following the rule adopted by this Court.”

Certainly the appellee cannot be “blamed in the slightest degree” for believing that there was no adequate remedy at law when he instituted suit in the Federal court in equity, nor the Federal courts for assuming that jurisdiction and granting the relief prayed.

We take it that the rule is clearly established that if at the time the suit was brought properly in equity and the jurisdiction has once attached, it will not be defeated by subsequent events, statutes or decisions.

In *Clark v. Wooster*, 119 U. S. 322, 325, where equity jurisdiction was challenged upon the ground

that when the suit was begun for patent infringement there was insufficient time to obtain equitable relief and that incidental legal relief, for damages, must be therefore obtained at law, the Court said, referring to judicial discretion, p. 325,

"We see no illegality in the manner of its exercise in this case. The jurisdiction had attached, and although, after it attached, the principal ground for issuing an injunction may have ceased to exist by the expiration of the patent, yet there might be other grounds for the writ arising from the possession by the defendants of folding guides illegally made or procured whilst the patent was in force. \* \* \* But even without that, if the case was one for equitable relief when the suit was instituted, the mere fact that the ground for such relief expired by the expiration of the patent, would not take away the jurisdiction, and preclude the court from proceeding to grant the incidental relief which belongs to cases of that sort. This has often been done in patent causes, and a large number of cases may be cited to that effect; and there is nothing in *Root v. Railway Co.*, 105 U. S. 189, to the contrary." Citing authorities.

Similar decisions are numerous—

*Beedle v. Bennett*, 122 U. S. 71.

*Busch v. Jones*, 184 U. S. 598.

*Carnegie Steel Co. v. Colorado F. & I. Co.* (C. C. A. 8th), 165 Fed. 195.

*U. S. Mitis Co. v. Detroit, etc., Co.* (U. S. C. C. A. 6th Cir.), 122 Fed. 863, 866.

In *Ransom, etc., Co. v. Martinstein*, 167 Cal. 406, 409, 139 Pac. 1060, the suit was to foreclose a lien but



the plaintiff turned out to be entitled only to a personal judgment, and it was held that the jurisdiction in equity was determinable by the facts as they existed when the suit was commenced. The Court said, p. 1061—

“It is said that ‘the rule is almost absolute that the jurisdiction of equity is to be determined by the facts existing when the suit is commenced.’ 16 Cyc. 113. Jurisdiction of the whole subject matter having attached by reason of the allegations of the complaint and the relief demanded therein, it appears to logically follow \* \* \* that the court could proceed to the end and give such judgment on the merits as it found plaintiff entitled to as to Crooks, within the limits, of course, of the case made by the complaint against him.”

In *Lex., etc., v. Canton*, 171 Mass. 414, 50 N. E. 931, plaintiff's water right was wrongfully interfered with under a supposed statutory authority and he was held entitled to damages assessed in a suit to enjoin interference, and not required to resort to the statutory method for assessing damages although the interference became lawful *pendente* through defendant's acts. The court said, p. 932—

“When the bill was filed, the plaintiff was entitled to relief under it. Since the filing of the bill the defect in the original certificate filed by the defendants has been cured. The plaintiff, therefore, no longer has any just ground for the issuing of an injunction to restrain the diversion of the water. But speaking generally jurisdiction in equity is fixed if the plaintiff is entitled

to relief at the time of the bringing of the bill, and the court will retain the bill and administer a remedy in damages, if that is appropriate, where the plaintiff loses his right *pendente lite* to purely equitable relief without fault on his part through some action on the part of the defendant."

In *Rosin v. Mayer*, 244 Mass. 494, 113 N. E. 217, where plaintiff sued for injunction, and rescission, and damages, and afterward waived his prayer for rescission, it was held that the court could nevertheless award the damages, the court saying, p. 217—

"Jurisdiction in equity was fixed when they brought their bill in good faith seeking the equitable relief to which they were entitled. *Lexington Print Works v. Canton*, 171 Mass. 414, 50 N. E. 931. That jurisdiction was not lost when the court proceeded to award damages as the remedy adapted to the case under the circumstances then existing. \* \* \* This practice is not confined to cases where the relief sought is prevented by act of a defendant, as in *Stewart v. Joyce*, 201 Mass. 301, 87 N. E. 613."

The apparent fact is that the Commonwealth of Kentucky, in the case of *Craig, Auditor v. Frankfort Distilling Co.*, 189 Ky. 620, cited, *supra*, was confronted with a loss of fifteen hundred dollars and contends that in the present case it is confronted with a loss of fifteen million dollars, and when the petition for rehearing was filed, the Commonwealth of Kentucky did not oppose it in the slightest degree, but up to, and, indeed, after, the present suit at bar

was brought, was most seriously contesting and contending for exactly the contrary construction.

Beyond all this, neither the case of *Craig, Auditor v. Security Producing & Refining Company*, nor that of *Craig, Auditor v. Frankfort Distilling Company*, is by any means conclusive even on the points on which they are cited as contrary to the case at bar. In each of those cases, there was simply involved the plain question clearly expressed in the repealing clause of one corporation license tax that a prior corporation license tax was repealed, yet these companies, through what is admitted to be oversight and error and a mistaken belief that both taxes were due, paid the two taxes, and the Court of Appeals on the contentions by the Commonwealth above described denied a right to recovery in the first opinion, though it is said in the last opinion in the *Security Producing & Refining Company* case:

"Such improper payment of money into the treasury as taxes cannot but appear to the Auditor by a glance at the statutes. He does not have to go into or review the attempted assessment made by the State Tax Commission, but need only to acquaint himself with the facts and look at the statutes imposing the tax on corporations to have it certainly appear to him that money has been paid into the treasury as taxes by the corporation when no such taxes were, in fact, due."

And, again, it was said:

"It is conceded that the Security Producing & Refining Company paid through mistake of law the taxes for 1918 and 1919 under sections 4189a and 4189c, when it was required to and did pay to the state a license tax equal to one per centum of the market value of the crude petroleum produced by it. It thus paid two license taxes when it was liable for only one."

By way of *obiter dictum* the court further suggests that in doubtful cases the Auditor should decline to pay, and that the courts, if they find the conditions of the statute have been complied with as to a mistake having been made, that the money was paid into the treasury when the money was not due, etc., may grant a mandamus to the tax payer on the ground of the invalidity of the statute, for a refund of the moneys so paid in by him. The result, therefore, is that there is still very grave doubt as to the construction of the law, and, in fact, there could not be a compliance with the provisions of the law as construed by the Court of Appeals as to the payment by it into the treasury, or a reclaim by it upon the Auditor.

Appellee has the right to seek the protection of the Federal courts, and if it had paid and sued for mandamus it would certainly have been met by the contention that this is a discretionary writ and only to be obtained in a very clear case and upon strict legal compliance with all the conditions precedent and this it could not have shown.

With reference to the writ of mandamus as a

remedy in cases involving disputes of fact, the Kentucky Court of Appeals, in *Montenegro-Riehm Music Company v. Board of Education*, 147 Ky. 720, used the following language:

"The Code provision confines the exercise of this remedy to cases in which an executive or ministerial officer declines or omits to perform an act, the performance or omission of which is enjoined by law. \* \* \* It was not contemplated that in cases of this character disputed issues of fact should be settled, but that the rights of the parties should be determined by such issues of law as might be presented by the pleadings, or an agreed state of facts, or a state of facts about which there could be little dispute." Citing a number of authorities.

Again the court in the same case said:

"It was not intended to aid a plaintiff in the enforcement of a mere contract right, or to take the place of the other remedies provided by law for the adjudication of disputed claims."

The foregoing opinion was cited with approval in *Gordon, etc., v. Morrow, Governor*, 186 Ky. 729.

But assuming only for the sake of argument that appellee had been able to find a purchaser for its warehouse receipt who was duly licensed and willing to *at once* withdraw the whisky, and appellee, therefore, could have the opportunity of starting its proceedings promptly; and had paid its money to the appellant warehouseman and had sued and maintained a suit for mandamus it is certain the Auditor and Attorney General would not have conceded that

appellee would be entitled to a warrant and such suit like the Security Producing & Refining Company case and the Frankfort Distilling Company case might have taken two years before a final decision was reached, during which time appellee would be out of the use of its money without interest and with the additional Federal questions involved the time of final decisions might have been even longer if the case was reviewed by writ of error.

But if finally appellee had been sustained and finally secured a warrant from the Auditor directed to the Treasurer for payment such warrant would only provide—not for the legal rate of interest nor the actual value of the money but for only 5% and the principal and interest would not, under the well-known and admitted practice in Kentucky, have been payable until from one to two years after the date of its issue, during all of which time the appellees would have been kept out of the use of their money.

It is, therefore, submitted that it was and still is proper for a court of equity to take jurisdiction and grant to the appellee in such case the only adequate, clear or complete relief to which it is apparently entitled.

### **(3) To Avoid a Multiplicity of Suits.**

Beyond all these considerations there is a further equitable ground. The appellee had the right in the control of its own property, and had it been permitted to do so without interference of this law, it might

have sold its property in five or ten barrel lots to the drug trade, which has the license to tax pay and withdraw, but if it had done so it would have become necessary for it by agreement to make all these separate payments month by month to the warehouse company and depended upon the warehouse company to make the payments under a mistaken belief that the tax was due, and under protest, and, then, perhaps, to have sued the warehouse company, or endeavored to sue the Auditor upon each separate transaction within the time limitation on such actions, or by agreement to let the final purchasers, who had the right to withdraw, deduct from their purchase price the fifty cent tax, and pay it to the appellant warehouse, and then, as the owner withdrawing sue, and if successful refund to appellee in completion of the purchase price. This situation clearly is not like one tax definitely levied, paid at one time by the tax payer himself direct into the treasury or to the Auditor, but would lead to a multiplicity of suits and actions, and, therefore equity is an available remedy. *Greene, Auditor v. L. & I. R'y Co.*, 244 U. S. 499.

**(4) The Act is Void because of the Excessive Penalties and Equity only can afford Relief.**

As stated *supra*, the Act, by Section five, for a failure to report and pay, provides a fine which shall

“be not less than five hundred dollars nor more than one thousand dollars, and each day after the date such report is due \* \* \* shall be treated and considered as a separate offense.”

Such a fine for one day's careless delay on even one barrel of whisky cannot be less than five hundred dollars, and before any suit could be tried through the warehouseman, the amount of the minimum fines would vastly exceed the value of the properties involved, and the Commonwealth, by failing to enforce the statute through the enforcement of the penalties, might so delay instituting suit or bringing it on for trial that there is no foretelling what the minimum or maximum penalties would amount to.

As we have pointed out, under the law of Kentucky the only person who can sue to recover back is the person who pays the money into the State treasury or to the Auditor, and this is alone required of the warehouseman. As further pointed out the owners of negotiable warehouse receipts, who wish to sell the same, would be deprived of their money and the tax through a deduction thereof instantter from the sale price of their warehouse receipts, and these receipts, being negotiable, the final owner thereof might wait years before he undertook to tax pay and



withdraw or remove his property; yet by reason of the penalty involved these burdens are thrown upon the present owner of the whisky, because no warehouseman can be found who would risk a test suit by refusing to report.

It is, therefore, submitted that this case comes clearly within the principles announced by this court in *Ex parte Young* (Minnesota Rate Case), 209 U. S. 145 to 147; and *Oklahoma Operating Co. v. Love*, 252 U. S. 331-336-337.

## VII.

**MOTION TO STAY PROCEEDINGS.**

The appellants moved the lower court to stay further proceedings herein because of the pendency of a suit of Sol Rosenbloom & Company v. E. H. Taylor, Jr. & Sons, pending in the Franklin Circuit Court, Record, pp. 40 to 60. This motion is based on the amendment of March 4, 1913, to Section 266 of the Judicial Code. This amendment consisted of inserting in the fourth line after the words "in the enforcement or execution of said statute," the words, "or in the enforcement or execution of an order of an administrative board or commission acting under and pursuant to the statute of such state," and adding at the conclusion of the section the following words:

"It is further provided that if before the final hearing of such application *a suit* shall have been brought in a court of the state *having jurisdiction thereof* under the laws of such state *to enforce such statute* or order, accompanied by a stay in such state court of proceedings under such statute or order pending the determination of such suit by such state court, all proceedings in any court in the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the state. Such stay may be vacated upon proof made after hearing and notice of ten days served upon the attorney general of the state that the suit in the state courts

is not being prosecuted with diligence and good faith." (Our italics.)

In the Judiciary Committee's report of February 27, 1913, Report No. 1584, the Committee recommended the amendment by the following statement:

"It seeks to correct grave abuses by Federal judges in issuing interlocutory injunctions restraining state railroad commissions from executing the orders promulgated by them. The Federal court in the South Dakota district held that the provisions of Section 266 of the judicial Code were not broad enough to include orders promulgated by railroad commissions, state boards, or other tribunals fixing maximum rates under a state statute. Just complaint is made on account of the action of the Federal court in tying the hands of the railroad commissioners and preventing them from enforcing orders against railroads and express companies. \* \* \*

"The Committee is of the opinion that the statute should be broadened, so as to prevent this kind of interference with state officials who are performing their duties under the provisions of a statute enacted by the Legislature of a state."

The Report further quotes from the inaugural address of Governor Byrne, of South Dakota, delivered January, 1913, as follows:

"It was the boast of the representatives of the railroads that in 13 minutes after the governor had signed at Pierre the act fixing passenger fares at 2 cents per mile the Federal judge at Sioux Falls had signed his sweeping order restraining the attorney general and all state attorneys from attempting to enforce it. Nearly

four years have passed since then, but we have not yet been able to learn from the court whether or not the fares fixed are reasonable. It is now nearly six years since the order of the board fixing  $2\frac{1}{2}$  cents per mile as the maximum charge for passenger fares was tied up by injunctions, yet in that time the court has not said whether such order is right or wrong. \* \* \* It would seem that no effective regulation of freight and passenger rates within the state lines is possible so long as the lower Federal courts are thus permitted to annul and bring to naught all efforts on the part of the people of the state to secure relief."

A careful examination of the Congressional Record shows that both in the House and Senate the bill was passed upon the recommendation of the Report of the Committee, without debate or discussion of its purpose.

The plain context of the two amendments is that it relates to the Federal courts enjoining proceedings when a suit has been brought *to enforce* regulatory statutes of a state, not to suits brought by individuals to enjoin as to him upon his giving a bond a particular collection from him. As we interpret the spirit of the act it is that when a suit has been brought *to enforce* a statute and the state courts not only decline to enforce it, but on the contrary enter an order staying all enforcement, so that no possible damage can result to anyone affected by the statute, that then the Federal courts will stay their proceedings pending the final result of such stay and litigation in the state

court. Apparently the only class of cases in the mind of the Committee relate to suits to put into effect rates which if stayed in any court would necessarily result in general relief.

The "suit" relied on by appellants was not brought "to enforce such statute," and no "stay" or injunction for the plaintiff therein could in the slightest degree relieve the appellee herein or secure its property for it. The appellants' attempted construction of these words is wholly at variance with the terms of the law when they ignore the classification expressed by the word "thereof," for according to their construction, any kind of suit for any purpose in the State court of Kentucky would defeat the Federal jurisdiction.

The suit relied upon to stay the proceedings herein is not general but personal and may be differentiated by the courts on questions of not even general interest in this litigation, as will appear from an examination of the record filed.

The suit relied upon herein is that of Sol Rosenbloom & Company, plaintiffs, versus E. H. Taylor, Jr. & Sons, defendants, filed March 26, 1920, in the Franklin Circuit Court, which is a court of original and general jurisdiction. This suit is purely personal to the plaintiff and alleges that in December, 1919, the plaintiffs then desiring to export certain whisky had 2000 cases bottled in bond; that the whisky was withdrawn from the general bonded warehouse to a bonded bottling house and there regauged

and bottled, and at that time reported and paid the license tax of the Commonwealth of Kentucky at 2c a gallon, as shown by the Warehouse Company's report to the Auditor in January, 1920; that because plaintiffs could not secure transportation, the whisky was not exported, but that now plaintiffs "have complied with all the Government regulations concerning their right to sell and dispose of said whisky and with the necessary permits to do so they have sold the same for medicinal purposes and are entitled to its immediate possession for the purpose of shipment to purchaser." Plaintiffs further show that the defendant, E. H. Taylor, Jr. & Sons, is claiming some lien upon the whisky for a tax of 50c a gallon imposed by the Act of March 12, 1920, and "plaintiffs further charge that the bottled in bond whisky named having been transferred and removed once from the warehouse and the license tax of 2c per gallon having been paid, it cannot be subjected to further or other license tax, nor, as they are advised, can it be subjected under the terms of the Act of March 16, 1920, to the 50c per gallon tax."

The summons was served upon the defendant the same day and the Franklin Circuit Court met April 5th for 30 judicial days but no further step was taken in the case until the 8th day of May when the defendant, Warehouse Company, filed an answer admitting most of the allegations of the petition but alleging: "The defendant is informed that aside from the question of construction of the Act there may be a

question as to the validity of said tax, and to protect itself, as far as may be, submits that it is entitled to hold said whiskey until that question is determined by some court of competent jurisdiction."

The suit at bar was filed by appellee on April 29, 1920, and its motion for a preliminary injunction was set for and heard on May 14, 1920.

On the 12th day of May the plaintiffs filed a reply and what is styled a cross-petition and also an amended petition, in the body of which, but without mentioning them in the caption as parties, it is alleged that Charles I. Dawson, as Attorney General, and John J. Craig, as Auditor, are threatening to enforce the 50c tax; alleging the unconstitutionality thereof; that the Judge of the court is now absent from the county, and that unless the defendants, Dawson and Craig, are immediately restrained and enjoined from enforcing said Act the plaintiffs will suffer great and irreparable injury, and "especially so from the delay arising in giving notice of this application." The reply and amended petition were verified by J. H. Hazelrigg, one of the attorneys for the plaintiff. And on the same date, May 12th, Craig and Dawson were summoned, and the plaintiffs, without notice to the Taylors, defendants, as would be necessary under Section 275 of the Kentucky Code, which distinctly provides: "an injunction shall not be granted against a defendant who has answered, unless he has had notice of the application therefor," applied at once to the Clerk, Kelly C. Smithers, for a

temporary restraining order which is addressed to the defendants, Dawson and Craig, and provides:

"You are hereby enjoined from requiring from the plaintiff or his agents or distiller in charge payment of the 50c per gallon tax on his whiskies described in the petition \* \* \* until further orders of the court."

The bond required by the Clerk for this order was fixed in the penal sum of \$2,000. It may be noted that the suit involves 2,000 cases of 3 gallons per case, or 6,000 gallons, and that the tax enjoined at 50c per proof gallon would amount to \$3,000; and that notwithstanding the claim of irreparable damage from the delay of giving notice of the hearing, no relief was asked or granted as against the original defendants, Taylors, who were before the court and who were refusing to deliver the goods until they were protected.

This order of injunction was served on the Auditor and Attorney General on the same day it was issued, May 12, 1920, and on the following day, May 13, 1920, the Judge of the Franklin Circuit Court, certified under the Act of Congress the official character of the Clerk of the Court, and on the following day, May 14, 1920, the defendants herein, Dawson and Craig, filed the above record in support of their plea in abatement, or for a stay of this proceeding, of which notice had been given to them on April 28, 1920.



The restraining order issued by the Clerk could, under Kentucky Code Section 276, only be issued when it is made to appear by affidavit "that irreparable injury will result to the applicant from the delay of giving notice." The whole state of the pleadings shows that the officers of the State enjoined could take no action whatever to enforce this law until after the first day of June, 1920, but that the defendants, Taylors, who were not notified or enjoined, have refused to permit the plaintiffs' agents to remove and ship this tax paid whiskey. From this it is obvious that there could be no irreparable injury from the delay of giving notice to the defendants who were enjoined. Furthermore, the defendants who were enjoined may claim to be strangers to the action, and that as to them the injunction is absolutely nugatory because, as stated, they are not named in the caption of the amended petition nor in the caption of the reply and cross-petition, whereas Section 110 of the Code provides:

"The caption of a pleading must state the name of the court in which the action is brought or pending, the names of the parties, designating who are plaintiffs and who are defendants, coupled with a word or short phrase describing the character of the pleading, with the exception: if there be several parties on either side a statement of the name of the plaintiff or defendant named in the petition, followed by the phrase . . . shall suffice, *except in petitions, cross-petitions and answers which make new parties to a set-off or counter-claim.*"

The amended petition comes within this class; the defendants enjoined were not named in the caption, and may claim to be strangers to the action. The rule is stated in Newman's *Kentucky P. & P.*, Sec. 196, as follows:

"It has been said that a statement in the body of the petition showing that an individual is a necessary party does not make him a party \* \* \* his name should be in the style of the action, which names the parties plaintiffs and defendants at the head of a petition and also in the body thereof."

Without impugning the good faith of the proceeding it is sufficient to say that that it is not a suit brought to enforce a state law; that the State Officials are not properly made parties to the suit; that the matter in controversy is the right to the possession of *tax paid* whisky by one having the right to withdraw it; whereas the pending suit is for a mere "transfer *under bond* out of Kentucky" by a plaintiff not having the right to the possession of or to withdraw the whiskey; and that in the Franklin Circuit Court suit the relief is purely personal and may be, and probably is, based upon an entirely different ground, viz.: that the whisky was tax paid prior to the attaching of the 50c tax imposed by the Vance Bill. The proceeding in the Franklin Circuit Court could not have given the appellee herein any relief whatever against the appellant, Louisville Public Warehouse Company, which had declined to surren-

der the appellee's property unless it was ordered to do so by a court of competent jurisdiction.

It further appeared (affidavit of T. K. Helm filed herein), that S. Rosenbloom had instructed his counsel to dismiss his suit in the Franklin Circuit Court but was unable to enter the order except by agreement of the Commonwealth during the vacation of that court, but proposes to dismiss it at the September term; and that Rosenbloom's counsel have expressed the intention of removing the pendency of that suit as any interference with the suit at bar, and are now merely suggesting to their clients that it may be prosecuted on the one special ground of the right to withdraw because that whisky has paid the 2c tax and is, therefore, not subject to the 50c tax.

It is, therefore, submitted that this court should not stay its proceeding but proceed to a determination of the merits of the appellee's rights.

WHEREFORE, the premises considered the appellee respectfully requests that the judgment be affirmed.

LEVI COOKE,  
EDMUND F. TRABUE,  
JOHN C. DOOLAN,  
JAMES P. HELM, JR.,  
THOMAS KENNEDY HELM,  
*Counsel for Appellee.*

## APPENDIX.

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AN ACT imposing an annual license tax upon every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits known as whisky or brandy or other species of double stamp spirits in this state, and upon every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in this state, and in removing same therefrom for the purpose of sale, or for any other purpose; providing for monthly reports by distilleries and bonded warehousemen, for the purpose of ascertaining the amount of tax due; providing for monthly payments of the amount of license tax due; fixing a penalty for failure to make such monthly report and settlement; providing for the manner of distribution of the taxes so collected; repealing all other license, franchise and excise taxes on the businesses covered by this Act; and declaring an emergency to exist.

*Be it enacted by the General Assembly of the Commonwealth of Kentucky:*

§1. Every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits, known as whisky or brandy or other species of double stamp spirits, in this state; and every corporation, association, partnership and individual engaged in the business of

owning and storing such spirits in bonded warehouses in this state, and in removing same therefrom for the purpose of sale, or for any other purpose, shall pay an annual license tax to the Commonwealth of Kentucky of fifty cents on every proof gallon of said distilled spirits so manufactured or stored in a bonded warehouse, or withdrawn from a bonded warehouse, or transferred therefrom under bond out of the Commonwealth of Kentucky.

§2. Every corporation, association, partnership and individual owning, controlling or operating a bonded warehouse in this state, wherein distilled spirits known as whisky or brandy or other species of double stamp spirits are stored, shall, on or before the first day of June, 1920, on blanks furnished by the Auditor of Public Accounts, report to the Auditor of Public Accounts the total amount of such spirits stored in a bonded warehouse owned, controlled or operated by such corporation, association, partnership or individual; and shall make monthly reports to the Auditor of Public Accounts thereafter, which reports must be signed and sworn to by such person, or, in case of a corporation, association or partnership, by some officer or person authorized to make such oath. The first report provided for herein shall show the number of proof gallons of such spirits withdrawn from said warehouse from the date this Act becomes effective to the date of making such reports; and each monthly report thereafter

shall show the number of proof gallons placed in said bonded warehouse since the date of making the last preceding report, the number of proof gallons withdrawn or transferred since the date of making the last preceding monthly report, and the aggregate number of gallons on hand at the date such report is made. In all cases where such spirits are transferred under bond from one bonded warehouse in this Commonwealth to another, said report shall show the warehouse from which same has been transferred and the warehouse to which same has been transferred, the quantity thereof and the serial number of each of the packages so transferred.

§3. Every person, corporation, association or partnership operating, owning or controlling such bonded warehouses, shall, at the time said reports herein provided for are made, pay to the Auditor of Public Accounts the tax of fifty cents per proof gallon upon each proof gallon of such spirits removed from the bonded warehouse owned, controlled or operated by such person, corporation, association or partnership, or transferred under bond out of this state, up to the date of making such report; and for the purpose of securing the payment of the license taxes herein provided for, the Commonwealth shall have a lien on all such spirits stored in such bonded warehouses, together with the other property of the bonded warehouseman used in connection therewith; and in all cases where the spirits so removed or trans-

ferred were owned or controlled by another than the bonded warehouseman, then the bonded warehouseman shall collect and pay the tax due on such spirits so removed or transferred under bond, and shall be subrogated to the lien of the Commonwealth.

§4. Every corporation, association, partnership and individual engaged in distilling spirits known as whisky or brandy or other species of double stamp spirits in this state, shall pay the license tax herein provided upon all such spirits so manufactured and removed from the premises without being placed in a bonded warehouse at the date of the removal of such spirits; and all such corporations, associations, partnerships and individuals engaged in the business of distilling such spirits in this state shall file monthly statements with the Auditor of Public Accounts, on blanks to be furnished by the Auditor, which statements must be sworn to and which statements shall show the number of proof gallons of such spirits so distilled and removed from the premises without having been stored in a bonded warehouse, and at the time of filing such statements shall pay to the Auditor of Public Accounts the amount due on such spirits so manufactured and removed; and for the payment of the taxes due under this provision, the Commonwealth shall have a lien upon all the machinery and the premises and the manufactured spirits made thereon, of the corporation, association, partnership or individual engaged in such distilling business.

§5. Every person, corporation, association or partnership failing to make the reports herein provided for, in the manner herein provided for, and failing to pay the taxes as they become due, as herein provided for, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than five hundred dollars nor more than one thousand dollars, and each day after the date such report is due that such person, corporation, association or partnership is in default shall be treated and considered as a separate offense.

§6. The tax herein provided for, when collected, shall be distributed as follows: To the State Road Fund, sixty-five per cent thereof; to the General Expenditure Fund, thirty-five per cent thereof.

§7. The license tax herein imposed shall be in lieu of all other license, franchise or excise taxes now imposed by law on persons, corporations, partnerships or associations engaged in business covered by this Act; and all Acts in conflict therewith are hereby repealed, and especially there is hereby repealed Chapter 5 of the Acts of the Special 1917 Session of the General Assembly of Kentucky.

§8. Whereas, many persons, corporations, associations and partnerships are now engaged in the business covered and licensed by this Act, without paying an adequate license tax to the Commonwealth of Kentucky therefor; and whereas, the liquor which they are handling and in which they are dealing is constantly in large quantities being removed from



the bonded warehouses and disposed of, without the state securing an adequate license tax thereon, an emergency is hereby declared to exist, and this Act shall take effect from and after the date of its passage and approval by the Governor.

### PROVISIONS OF KENTUCKY CONSTITUTION.

*Sec. 13.* No person shall, for the same offense, be twice put in jeopardy of his life or limb, nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him.

*Sec. 14.* All courts shall be open and every person, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale denial or delay.

*Sec. 171.* The General Assembly shall provide by law an annual tax, which, with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only and shall be uniform upon all property of the same class subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws. The General Assembly shall have power to divide property into classes and

to determine what class or classes of property shall be subject to local taxation. Bonds of the State and of counties, municipalities, taxing and school districts shall not be subject to taxation.

*Sec. 172.* All property, not exempted from taxation by this Constitution, shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale; and any officer, or other person authorized to assess values for taxation, who shall commit any willful error in the performance of his duty, shall be deemed guilty of misfeasance, and upon conviction thereof shall forfeit his office, and be otherwise punished, as may be provided by law.

*Sec. 174.* All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this Constitution; and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this Constitution shall be construed to prevent the General Assembly from providing for taxation based on income, licenses or franchises.

*Sec. 181.* The General Assembly shall not impose taxes for the purposes of any county, city, town or other municipal corporation, but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes. The General Assembly may, by general laws only, provide for the payment of license fees on franchises,

stock used for breeding purposes, the various trades, occupations and professions, or a special or excise tax; and may, by general laws, delegate the power to counties, towns, cities and other municipal corporations, to impose and collect license fees on stock used for breeding purposes, on franchises, trades, occupations and professions.

Craig, Auditor {Security Producing & Refining Company.  
 {Frankfort Distilling Company.

(When the above cases were first decided the leading opinion was rendered in the Frankfort Distilling Company case and the Security Producing & Refining Company case decided on its authority as a companion case, but on the petition for rehearing the chief opinion was written in the Security Producing & Refining Company case and the same conclusion announced in the companion case of Frankfort Distilling Company.)

First Opinion March 9, 1920.

Opinion on Rehearing Nov. 16, 1920.

The Frankfort Distilling Company is a corporation organized under the laws of the State of Kentucky, and was liable for a license tax on its capital stock under Section 4189a, Kentucky Statutes, up until the year 1918, at which time it became liable under Section 4214a-1, Kentucky Statutes, for a license tax of two (2c) cents on every proof gallon of distilled spirits shown by its official records to be in its possession. The State Tax Commission in the latter part of 1917 furnished to the Frankfort Distilling Company the necessary blank required by Section 4189d, Kentucky Statutes, on which to make its report for a license tax based upon its authorized stock. Shortly thereafter and in due time the corporation returned the blank properly filled out, signed

"The Security Producing and Refining Company, a corporation, was assessed by the State Tax Commission and paid into the State Treasury a license tax \$750.00, for the year 1918, and a like amount for the year 1919, under Sections 4189a and 4189c, Kentucky Statutes, and is now suing and is granted a mandamus by the lower court against the Auditor, requiring him to draw his warrant on the State treasury for the \$1,500.00 paid by it as tax when no license tax was due by said company at that time on this account. The Auditor is prosecuting this appeal. Section 162, Kentucky Statutes, provides: 'when it shall appear to the Auditor that money has been paid into the treasury for taxes when no such taxes were in fact due, he shall issue his warrant on

Craig, Auditor {Security Producing & Refining Company.  
 {Frankfort Distilling Company.

First Opinion March 9, 1920.

Opinion on Rehearing Nov. 16, 1920.

and verified to the Tax Commission, which body by the aid of the information contained in the report assessed the Frankfort Distilling Company under Sections 4189a and 4189c, a license tax of \$125. This fact was certified by the Tax Commission to the Auditor, and the Commission notified the Frankfort Distilling Company of the assessment and the amount thereof. The Auditor certified the amount of the assessment to the Treasurer. The Distilling Company made no objection whatever to the assessment, and shortly thereafter paid the \$125 into the State Treasury. About the first of the year 1919, a similar blank was sent to the Distilling Company, which was filled out and returned in the same manner and the tax paid in 1919. Thereafter on the 15th of August, 1919, the Distilling Company instituted this action against the Auditor to recover the \$250 paid in by it on such license tax, praying a writ of mandamus against the Auditor, requiring him to draw his warrant in favor of the plaintiff, Distilling Company, upon the treasurer of the Commonwealth for said sum.

the treasury for such money so improperly paid, in behalf of the person who paid the same. Nothing herein contained shall authorize the issuing of any such warrant in favor of any person who may have made payment of the revenue tax due on any tract of land, unless it is manifest that the whole of the tax due the Commonwealth on such land has been paid, independent of the mistaken payment, and ought to be reimbursed.' In construing this section of the statutes we held in *Greene, Auditor, v. Taylor*, 184 Ky. 739, 'that taxes voluntarily paid to counties, cities, towns and county officers, collecting the State's revenues *and other collecting officers*, can not be recovered, although not due, and paid under a mistake of law. *City of Louisville v. Anderson*, 79 Ky. 334; *L. & N. R. R. Co. v. Hopkins Co.*, 87 Ky. 605; *L. & N. R. R. Co. v. Commonwealth*, 89 Ky. 531.

"It is conceded that the Security Producing & Refining Company paid, through mistake of law, the taxes for 1918 and 1919 under Sections 4189a and 4189c, when it was required to and did pay to the State a license tax equal to one per centum of the

Craig, Auditor {Security Producing & Refining Company.  
 {Frankfort Distilling Company.

First Opinion March 9, 1920.

Opinion on Rehearing Nov. 16, 1920.

Greene as Auditor filed his answer, to which the Distilling Company interposed a general demurrer, which was overruled. The Distilling Company then filed reply, completing the issues. To the reply the Auditor filed a general demurrer, which was overruled, and the Auditor excepted. The facts being admitted, neither party desired to plead further, and the court entered a final judgment granting the mandamus requiring the Auditor to draw his warrant on the Treasurer for \$250 in favor of the Distilling Company for the license tax paid in by it. The Auditor prosecuted this appeal.

It is admitted that the Frankfort Distilling Company is a corporation and that it was required in the years 1918 and 1919 to pay a license tax of two (2c) cents on every proof gallon of distilled spirits shown by its official record to be in its possession on the date fixed by law, under Section 4214a-1, Kentucky Statutes; that it was not liable for the license tax imposed by Sections 4189a and 4189c, Kentucky Statutes, and that it should not have paid into the treasury the \$250 which it now seeks to recover. On

market value of the crude petroleum produced by it. It thus paid two license taxes when it was liable for only one. When it became liable for the license tax under Section 4223c on its oil production, it was by the provisions of Section 4189a relieved of liability for a license tax upon its capital stock, but it paid both these taxes and now seeks to recover the sum paid as the latter.

"Appellee corporation insists that the attempted assessment of the taxes by the Tax Commission against the corporation was wholly without authority and, therefore, void.

"Fundamentally no tax can be levied or collected by the State except under and by authority of legislative enactment. Money otherwise received by the State as taxes is unwarranted, and should be returned to the payor upon his compliance with the provisions of Section 163 Kentucky Statutes. It is admitted that the money sought to be recovered in this action, though paid as taxes, was not due as such, and the Security Company by mistake of law paid the same though unwilling to do so, had it comprehended its legal rights. The attempted

Craig, Auditor (Security Producing & Refining Company.  
 )Frankfort Distilling Company.

First Opinion March 9, 1920.

Opinion on Rehearing Nov. 16, 1920.

these facts the Distilling Company insists that it should be granted a mandamus requiring the Auditor to draw his warrant in its favor for the money paid in by it as a license tax when no such tax was due, as provided by Section 162, Kentucky Statutes.

One who pays into the State Treasury money as tax when none is due, may recover the same, if the payment was not made voluntarily and the tax was not assessed and levied by a taxing authority having power to assess the same, other than the Auditor. If the tax sought to be recovered was voluntarily paid into the treasury of the State, no recovery can be had; and it was voluntarily paid if the assessment could not have been collected by distraint, but taxes are involuntarily paid if the same are collectible by distraint. *Greene, Auditor, v. Taylor*, 184 Ky. 730.

The tax here sought to be recovered is not such as could have been distrained, but the Commonwealth could have enforced collection, if at all, only by an action at law. This would not have amounted to distraint; and taxes collectible by action only, as in this case, and paid without such

assessment made by the State Tax Commission was unwarranted and void because no such license tax was due at that time from the corporation. Money so paid as taxes should be returned to the payor on his timely application. The Statutes, Section 162, which provides that when it shall appear to the Auditor that money has been paid into the treasury as taxes when none were in fact due, *shall* be returned to the payor, was intended to cover all such cases. Such improper payment of money into the treasury as taxes can not but appear to the Auditor by a glance at the statutes. He does not have to go into or review the attempted assessment made by the State Tax Commission but need only to acquaint himself with the facts and look at the statutes imposing the tax on corporations to have it certainly appear to him that money has been paid into the treasury as taxes by the corporation when no such taxes were in fact due. When it does so appear to the auditor it is his duty to and he may be compelled by mandamus to issue his warrant on the treasury in repayment of the same. In every case where money

Craig, Auditor {Security Producing & Refining Company.  
 {Frankfort Distilling Company.

First Opinion March 9, 1920.

Opinion on Rehearing Nov. 16, 1920.

ent, are paid voluntarily and are not recoverable by the payor or any one for his benefit, certainly so, if it appear that a regular assessment was made by a duly constituted taxing authority having such matters in charge. The Auditor has no authority whatever to review or correct assessments made by properly constituted taxing authorities, and he can not therefore be required by mandamus to draw his warrant upon the treasurer for the return of money paid in as taxes, even where none were due on a regularly made assessment of a duly authorized taxing agency. A corporation which is requested to send in a tax list so that it may be assessed for a license tax, which corporation voluntarily responds to such request and sends in the tax list on which the taxing authority assesses such tax and notifies the corporation of its action, and the amount of its assessment, and the corporation acquiesces in the assessment and pays in the money without protest, the Auditor is without authority to correct the assessment and can not therefore be required by mandamus to draw his warrant on the treasury for

is received as taxes when not authorized by statute or in violation thereof the duty immediately devolves on the Auditor, upon proper application by the person paying the same, to issue his warrant on the treasury in repayment of said sum to the payor. It can appear to the Auditor that money has been paid into the treasury as taxes when none are due in at least two ways: (1) When there is no warrant in the statutory law of the State for the levy or collection of such taxes; (2) when the improper and unwarranted payment is made under a void or unenforceable statute or through mistake or inadvertence of the taxpayer, directly into the treasury or to the Auditor. In either of such case it can not fail to appear to the Auditor upon proper investigation that money has been paid into the treasury as taxes when no such taxes were in fact due, and it then becomes his duty to and he shall issue his warrant on the treasury for the repayment of the money so improperly paid in behalf of the person who paid the same, provided proper application is made therefor. Manifestly the purpose of the Legis-



Craig, Auditor {Security Producing & Refining Company.  
 )Frankfort Distilling Company.

First Opinion March 9, 1930.

Opinion on Rehearing Nov. 16, 1930.

the amount of money thus paid in. This rule is rested upon another rule which gives each litigant only one day in court and if he refuses to accept his day in court when his attention is called to it, and to litigate the matter when it is open for litigation, he will not be heard to complain or be allowed to litigate after the matter has been finally determined. When the Tax Commission requested the corporation to send in its tax list so that the license tax might be ascertained, the corporation should have refused so to do and it would not have been liable had it done so in this instance; and after it sent in its tax list and the Taxing Commission assessed the corporation with the license tax and notified it of such action, and the amount of the tax, it should have asked a rehearing before the Board, and it was entitled to have a rehearing had it requested one, and when the Auditor certified the amount to the treasurer the corporation had yet another chance to avoid payment, as it may then have enjoined collection of the taxes, but after all these steps had been regularly taken and the money paid into the treas-

lature in passing Section 162, *ex-pa*, was to secure the return of all money paid into the treasury as taxes by taxpayers through mistake, inadvertence, misapprehension of the law, or under void or unenforceable statutes, for it expressly declares it to be the duty of the Auditor to issue his warrant in every case where it shall appear to him that the State holds money rightfully and in good conscience belonging to another.

"Following this rule, the Auditor should have promptly issued his warrant on the treasury for \$1,500 in favor of appellee, Security Producing and Refining Company.

"The Auditor can not act arbitrarily in the payment of money but will be held to strict accountability for all money paid out by him. In doubtful cases he should refuse payment until the question has been determined by the courts. But in every case, such as this, where it is made to appear to the Auditor that money has been paid into the treasury as taxes when no such taxes were in fact due, and demand has been made for its return within the time and in the manner provided

Craig, Auditor { Security Producing & Refining Company.  
 { Frankfort Distilling Company.

First Opinion March 9, 1920.

Opinion on Rehearing Nov. 16, 1920.

ary and mingled with other public monies and distributed by the State, it was too late for the corporation to take the initial step to recover it.

It follows, therefore, that the chancellor erred to the prejudice of the appellant in granting the mandamus, requiring the Auditor to draw his warrant on the treasurer for the money paid as tax when none were due. (Our italics.)

The appeal is granted and the judgment reversed with direction to dismiss the petition.

CHAR. L. DAWSON,

Atty. Gen. Frankfort, Ky.

For Appellant.

HAZELRIG & HAZELRIG,

Frankfort, Ky.

For Appellee.

A Copy; Attest,

ROY B. SPECK,

Clerk Court Appeals.

A.C.

by Section 163, Kentucky Statutes, he should promptly draw his warrant on the treasury and return to the payor the money thus received, *but* the Auditor is not required to go into or review assessments of *taxing agencies* to determine whether the payment is due or not.

"The cases of Bank of Commerce of Louisville v. Stone, 108 Ky. 427, and Greene, Auditor, v. Taylor, *supra*; Louisville City National Bank v. Coyler, 112 Ky. 584; County v. Bosworth, 160 Ky. 312; Louisville Gas Co. v. Bosworth, 169 Ky. 824, and all other cases announcing a similar rule, in so far as they conflict with the construction herein given Section 162, Kentucky Statutes, are expressly overruled. We can think of no reason why the State should not be required to live up to the same moral standards demanded of individuals and repay money received by it through mistake or inadvertence. Any other rule is unconscionable and bad in morals if not actually dishonest. The State should not merely because it has the power to declare the law, take to itself money rightfully and in good conscience belonging to its

Craig, Auditor { Security Producing & Refining Company.  
                          { Frankfort Distilling Company.

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First Opinion March 9, 1920.

Opinion on Rehearing Nov. 16, 1920.

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citizens and taxpayers without just return. Such a statute would be both arbitrary and unjust and we can not conceive of the great law-making department of this Commonwealth contemplating such a thing by the enactment of Section 162, Kentucky Statutes. Such a purpose, if expressed in a statute would be inimical to all the past declared public policy of the State. The lower court did not err in awarding the writ or mandamus against the Auditor compelling him to draw his warrant on the treasury in favor of the plaintiff and appellee and the judgment is affirmed." (189 Ky. 565.)

# SUPREME COURT OF THE UNITED STATES.

Nos. 439 and 582.—OCTOBER TERM, 1920.

Charles I. Dawson, Attorney General of the State of Kentucky, Victor A. Bradley, Commonwealth's Attorney for the Fourteenth Judicial District of Kentucky, John I. Craig, Auditor of Public Accounts of the State of Kentucky, Appellants,

439

*vs.*

Kentucky Distilleries & Warehouse Company.

Appeal from the District Court of the United States for the Eastern District of Kentucky.

Charles I. Dawson, Attorney General of the Commonwealth of Kentucky, and individually; Louisville Public Warehouse Company (a corporation); John J. Craig, Auditor of the Commonwealth of Kentucky, and individually, Appellants,

582

*vs.*

The J. & A. Freiberg Company, Incorporated.

Appeal from the District Court of the United States for the Western District of Kentucky.

[February 28, 1921.]

Mr. Justice BRANDEIS delivered the opinion of the Court.

On March 12, 1920, the Legislature of Kentucky passed and the Governor approved an Act which imposed upon every person engaged in the business of manufacturing whisky or "in the business of owning and storing" the same in bonded warehouses within the State what was called an "annual license tax" of fifty cents a gallon upon all whisky either withdrawn from bond or transferred in bond from Kentucky to a point outside that State. The Act took effect, by its terms, on its approval by the Governor. At that time there were stored in such bonded warehouses about 30,000,000 gallons of whisky worth in bond perhaps \$1.50 a gallon. Much

2 *Dawson et al. vs. Kentucky Distilleries & Warehouse Co.*

of this whisky was owned by citizens of other States, their ownership being evidenced by negotiable warehouse receipts. Shortly after the enactment of the statute two suits were brought in the District Courts of the United States for Kentucky to enjoin its enforcement. The first was brought in the Western District, by the J. & A. Freiberg Company, Incorporated, an Ohio corporation; the second in the Eastern District by the Kentucky Distilleries and Warehouse Company, a New Jersey corporation. The Attorney General of the Commonwealth and the Auditor of Public Accounts were made defendants in each. In the former the Louisville Public Warehouse Company was also a defendant; in the latter, the Commonwealth's Attorney.

In the *Freiberg* case it was alleged that the whisky was in a general bonded warehouse;<sup>1</sup> that the owner wished to withdraw it for removal in bond to a general bonded warehouse in Massachusetts; and that the defendant warehouseman, acting under provisions of the Kentucky statute refused to permit such transfer unless the tax in question was paid by the owner. In the *Distilleries Company* case the plaintiff alleged that it had in its distillery warehouses large quantities of whisky, most of which was owned by others, that requests were being made daily either to withdraw lots from bond upon paying the Government tax or to have them transferred in bond to other States; and that the defendants threatened to enforce heavy penalties if any such withdrawal or transfer was permitted without making payment of the 50 cents

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<sup>1</sup>Every bonded warehouseman was required to make to the State on June 1, 1920, and monthly thereafter, a report showing all the whisky in bonded storage and the number of proof gallons withdrawn or transferred. The Act provided by Section 3 that all bonded warehousemen "shall at the time said reports herein provided for are made, pay to the Auditor of Public Accounts the tax of fifty cents per proof gallon upon each proof gallon of such spirits removed from the bonded warehouse . . . or transferred under bond out of this State, up to the date of making such report; and for the purpose of securing the payment of the license taxes herein provided for, the Commonwealth shall have a lien on all such spirits stored in such bonded warehouses, together with the other property of the bonded warehousemen used in connection therewith; and in all cases where the spirits so removed or transferred were owned or controlled by another than the bonded warehouseman, then the bonded warehouseman shall collect and pay the tax due on such spirits so removed or transferred under bond, and shall be subrogated to the lien of the Commonwealth.

266  
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a gallon state tax. In each case a motion for an interlocutory injunction was made and heard before three judges under Section 266 of the Judicial Code. The substantial questions presented in the two suits were the same. The plaintiff contended, in each, that the Kentucky statute was void under both the State and Federal constitutions; and in each case the defendants, besides asserting the validity of the Act, insisted, among other things, that the suit should be dismissed for want of equity because there was an adequate remedy at law. The District Courts granted plaintiffs' the motions, holding that there was no adequate remedy at law and that the statute was invalid under the constitution of the State because it was a property tax, was not uniform in its operation, and was confiscatory. The case comes here by direct appeal under Section 293 of the Judicial Code. We shall consider first the validity of the tax.

*First.* The Attorney General concedes that the tax, if a property tax, is invalid; since it does not comply with the requirements of a property tax specified in section 171 of the state constitution. It is not "uniform upon all property of the same class subject to taxation",<sup>2</sup> and though called an "annual" tax was not intended to be such.<sup>3</sup> He contends, however, that the tax is, as stated in the title of the Act, a license tax upon "the business of manufacturing" distilled spirits and upon "the business of owning and storing such spirits in bonded warehouses." Section 181 of the state constitution authorizes license or occupation taxes; and statutes imposing such taxes measured by the amount of the product have been repeatedly sustained by its highest court. *Raydure v. Board of Supervisors of Estill County*, 183 Ky. 84. *Strater Bros. Tobacco Co. v. Commonwealth*, 117 Ky. 604. Here we are concerned only

<sup>2</sup>If the tax in question were a property tax there would be double taxation of this property and the uniformity clause would be violated, because the whisky has never been put into a separate class; and under another statute all whisky stored in bonded warehouses was required to be assessed by the State Tax Commission at its fair cash value; and taxes at the rate of 40 cents per \$100 of value were payable thereon. Ky. Stat. §4019, as amended March 5, 1918. Compare *Campbell County v. City of Newport*, 174 Ky. 712, 723. *Raydure v. Board of Supervisors*, 183 Ky. 84, 97.

<sup>3</sup>It was admitted that it would be clearly void as being confiscatory unless it was assumed that it was to be levied only once—namely when the whisky is withdrawn from bond or when it is transferred in bond to another State. Compare *Sallsbury v. Equitable Purchasing Co.*, 177 Ky. 348, 351, 353.

4 *Dawson et al. vs. Kentucky Distilleries & Warehouse Co.*

with the taxes which are alleged to be on "the business of owning and storing such spirits in bonded warehouses." The question is whether as to such this fifty cents a gallon tax is an occupation tax or is a property tax. The question is one of local law, so that a decision of it by the highest court of the State would be accepted by us as conclusive. But the validity of the statute does not appear to have been passed upon by any Kentucky court. We are, therefore, called upon, as were the District Courts, to determine this question of state law.

The name by which the tax is described in the statute is, of course, immaterial. Its character must be determined by its incidents; and obviously it has none of the ordinary incidents of an occupation tax. Unlike the tax of one and one-fourth cents a gallon upon rectifiers sustained in *Brown-Forman Co. v. Kentucky*, 217 U. S. 563, and the tax of two cents a gallon upon distillers and warehousemen sustained in *Green, Auditor v. Taylor, Jr. & Sons*, 184 Ky. 739, this tax is not upon the business or occupation of the warehouseman. A particular lot of whisky may pass through a dozen bonded warehouses without one of them being obliged to pay the tax. For the only warehouseman required to do so, is he who has the whisky on storage at the time of its removal from bond (Government) tax paid or when it is transferred in bond to another State. The tax is made primarily payable by the warehouseman and to secure its payment the State is given a lien upon the warehouse and the whisky therein. But the warehouseman is a collection agency merely empowered to get reimbursement through subrogation to the State's lien on the whisky of others which ultimately bears the burden of the tax. Nor is the alleged business of merely owning and storing whisky in bond made taxable. So long as the whisky is stored in bond within the State it is free of the tax. One may own and store the whisky for years in the hope of selling it at a profit, and yet be free from any obligation ever to pay this tax, if, before its removal from bond within the State, the whisky is sold to another or if, while so owned, it is destroyed or forfeited to the Government. Likewise the tax is not one imposed upon the business of owning, storing and removing whisky from bond. For the tax would become payable on account of whisky removed, although there had not been storage for any appreciable time; thus the tax would be payable on whisky if it

had been removed from the warehouse immediately after the approval of the Act. Nor is the tax one on the business of removing liquor owned. For the tax is payable in respect to any lot of whisky removed; and a single transaction does not constitute engaging in the business, be it that of buying and selling whisky or in the business of otherwise using it.<sup>4</sup> In fact the tax is one imposed upon each lot of whisky at the time it is removed from bond within the State. The tax might be said to be upon the act of removal from the bonded warehouse within the State. But as stated by the lower court, "the thing really taxed is the act of the owner in taking his property out of storage into his own possession (absolute or qualified) for the purpose of making some one of the only uses of which it is capable i. e., consumption, sale or keeping for future consumption or sale. . . . The whole value of the whisky depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value." To levy a tax by reason of ownership of property is to tax the property. Compare *Thompson, Auditor v. Kreutzer*, 112 Miss. 165; *Thompson, Auditor v. McLeod*, 112 Miss. 383. It can not be made an occupation or license tax by calling it so. See *Flint v. Stone Tracy Co.*, 220 U. S. 107, 148-150; *Zonne v. Minneapolis Syndicate*, 220 U. S. 187; *United States v. Emery*, 237 U. S. 28. The language of the emergency clause in the Act discloses that the Legislature considered that it was, in fact, taxing the whisky.<sup>5</sup>

As we hold the tax to be one on property and it is conceded that, if it be such, it is invalid under the state constitution, we have no occasion to consider whether it would be also invalid under the state constitution as a license or excise tax, because confiscatory; compare *Owen County v. F. & A. Cox Co.*, 132 Ky. 738, 743; *City of Louisville v. Pooley*, 136 Ky. 286; *Sallsbury v. Equitable Purchasing Co.*, 177 Ky. 348, 351, 354; or for other reasons. Nor need

<sup>4</sup>That an isolated transaction would not under the law of Kentucky constitute engaging in a business; see *Hays v. Commonwealth*, 107 Ky. 655, 658; *Evers v. City of Mayfield*, 120 Ky. 74, 77; *Louisville Lozier Co. v. City of Louisville*, 159 Ky. 178, 180.

<sup>5</sup>"And whereas the liquor which they are handling and in which they are dealing is in large quantities being removed from the bonded warehouses and disposed of, without the State securing an adequate license tax thereon an emergency is hereby declared to exist."



6 *Dawson et al. vs. Kentucky Distilleries & Warehouse Co.*

we consider whether it is not also obnoxious to the Federal Constitution as imposing a burden upon interstate commerce. Compare *Heyman v. Hays*, 236 U. S. 178.

*Second.* The Attorney General insists that these bills in equity should have been dismissed because each plaintiff had a plain, adequate and complete remedy at law. The contention rests upon section 162 of the Kentucky statutes which declares that:

"When it shall appear to the Auditor, that money has been paid into the treasury for taxes, when no such taxes were in fact due, he shall issue his warrant on the treasury for such money so improperly paid, in behalf of the person who paid the same."

*Greene, Auditor v. Taylor, Jr. & Sons*, 184 Ky. 739, is cited to show that if the Auditor fails in this duty, a writ of mandamus will issue to compel performance. The plaintiffs, it is said, should have paid the tax under protest and have sued at law to recover the amounts so paid. But when these suits were brought (April and May, 1920) the decisions of the highest court of the State left it at least doubtful whether money so paid could have been recovered at law by the taxpayer, among other reasons, because the money would not have been paid under compulsion of distraint or of a right of distraint or under a mistake of law or of fact.\* It was not until November 16, 1920, which was after these appeals had been entered in this court, that *Craig v. Security Producing and Refining Co.*, 189 Ky. 565, 568, settled that money paid under such circumstances could be recovered. The Court of Appeals of Kentucky recognized the doubt arising from its earlier decisions and in order to remove the doubt found it necessary to overrule several of its recent opinions "so far as they conflict with the construction herein given Section 162."

It is well settled that "if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit." *Davis v. Wakelee*, 156 U. S. 680, 688. But whatever remedies Section 162 is now regarded as conferring, it is clear that at the time this suit was brought they were not regarded in Kentucky as sufficiently adequate to oust the jurisdiction of equity to enjoin the illegal collec-

\*Compare *Louisville City Nat. Bank v. Coulter*, 112 Ky. 577, 584; *County v. Bosworth*, 160 Ky. 312; *Louisville Gas Co. v. Bosworth*, 169 Ky. 824; and the first opinion in *Craig v. Security Producing and Refining Co.*, rendered March 9, 1920.

tion of taxes. *Gates v. Barrett*, 79 Ky. 295; *Norman v. Boaz*, 85 Ky. 557, 560; *Negley v. Henderson Bridge Co.*, 107 Ky. 414; *Louisville Trust Co. v. Stone*, 107 Fed. 305, 309. And if the equitable remedy was available in the state courts it was not lost by suing in the federal court. *Davis v. Gray*, 16 Wall. 203, 221; *Cowley v. Northern Pacific Ry. Co.*, 159 U. S. 569. Nor is the equitable jurisdiction lost because since the filing of the bill an adequate legal remedy may have become available. *Beedle v. Bennett*, 122 U. S. 71; *Busch v. Jones*, 184 U. S. 598. We have no occasion, therefore, to consider other reasons urged why the legal remedy, if any, would have been inadequate.

**Third.** The Attorney General moved that these suits be abated relying upon the amendment to Section 266 of the Judicial Code by Act of March 4, 1913, c. 160, 37 Stat. 1013, which declares that if before the final hearing of an application to restrain the enforcement of a statute or an order made by an administrative board or commission

"a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State."

The suit pending in the state court was this: A liquor dealer who owned whisky in a distillery warehouse had, prior to the enactment of the statute here in question, caused it to be bottled in bond and had paid thereon the two-cent a gallon state tax imposed under the law of 1917. He claimed the right to withdraw the whisky from bond without payment of the 50-cent a gallon tax; and brought suit in a county court to enjoin the warehouseman from preventing his doing so. The latter set up this 1920 Act. Thereupon the plaintiff by amended petition joined the Attorney General and the Auditor as codefendants and prayed that they be enjoined from compelling the plaintiff or the warehouseman to pay the 50-cent a gallon tax on the plaintiff's whisky. A restraining order to that effect issued.

Whether this suit in the county court was of such a character as to entitle the state officials to stay the proceedings in the fed-

eral court we do not decide. Strictly speaking it was not "brought . . . to enforce" the statute in question; but it is, at least, arguable that it might have been accepted by the state officials as a means to that end, and so have fulfilled in substance the statutory requirement. See House Report No. 1564, 62nd Cong. 3rd Sess. But whether this is true or not, it was not "accompanied by a stay in such state court of proceedings under such statute" within the meaning of the Judicial Code. The stay contemplated by Congress is a general one, which would protect, among others, those who had already sought protection in the federal court. The restraining order<sup>7</sup> issued in the purely private litigation between third parties in the county court left the plaintiffs in the suits before us subject to all the danger of irreparable injury against which they had sought protection in the federal courts.

*Affirmed.*

A true copy.

Tst:

*Clerk Supreme Court, U. S.*

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<sup>7</sup>"You are hereby enjoined from requiring from the plaintiff or his agents or distiller in charge payment of the 50¢ per gallon tax on his whiskies described in the petition . . . until further orders of this court."